92-1688

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

APRIL TERM, 1993

JOHN DOE, a minor, by father, JAY DOE; and
ALEXIS DOE, a minor, by father, DAVID DOE; and
JAY DOE, CINDY DOE, DAVID DOE and LINDA DOE,
Petitioners,

VS.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether expert testimony is necessary to establish a plaintiffs' right to damages for emotional pain and suffering; damages for permanent injuries; or an award for future damages.

2. Whether a party relying upon circumstantial evidence to prove damages in a civil case must negate every other possible cause for the damage to recover for those damages.

3. What is the correct definition of circumstantial evidence.

4. Whether the tort of seduction is still a viable cause of action in the State of Illinois.

5. Whether the United States Court of Appeals for the Seventh Circuit should have deferred to the Illinois Supreme Court on the question of the viability of the tort of seduction and referred the question to the Illinois Supreme Court for their decision pursuant to Seventh Circuit Court of Appeals Rule 52 and Illinois Supreme Court Rule 20.

6. Whether the Court of Appeals' analysis of the parent plaintiffs' cause case resting upon the tort of seduction as an intentional tort rather than under the theory that the government negligently allowed it to occur is contrary to its prior holding in the first appeal in this cause, *Doe v. United States*, 838 F.2d 220 (7th Cir. 1988), and this court's opinion in *Sheridan vs. United States*, 487 U.S. 392, 108 S.Ct. 2449 (1988).

7. Whether an award of $25,000 to a minor who was sexually molested while at an Air Force day care center is inadequate as a matter of law and shocking to the conscience.

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PETITION FOR WRIT OF CERTIORARI

TO: The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States

John Doe, a minor, by father, Jay Doe; and Alexis Doe, a minor, by father David Doe; and Jay Doe, Cindy Doe, David Doe and Linda Doe petition this Court for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Opinion of the Court of Appeals (App. A) is reported at 976 F.2d 1071.

The Opinion of Court of Appeals denying the Petition for Rehearing and Petition for Rehearing In Banc (App. B) is unreported.

The Opinion of the United District Court, Southern District of Illinois (App. C) is unreported.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit denied petitioners' Petition for Rehearing on January 21, 1993 This Petition is filed accordingly within the time allowed by law. The jurisdiction of this Court is invoked under 28 USCA 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1291 - Final decisions of district courts

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1346 (b) - United States as defendant

> (b) Subject to the provisions of chapter 171 of this title, the district court, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions or claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 2671 *et seq.* - Definitions

> As used in this chapter and sections (1346(b) and 2401(b) of this title, the term –

"Federal agency" includes the executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the services of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member or naval forces of the United States, means acting in line of duty. June 25, 1948, c. 646, 62 Stat. 982; May 24, 1949, c. 139 § 124, 63 Stat. 106.

Federal Rules of Civil Procedure

Fed.R.Civ.P. 52(a) – Findings by the Court; Judgment on Partial Findings

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of

law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule.

Seventh Circuit Rules

7th Circuit Rule 52 – Certification of Questions of State Law

When the rules of the highest court of a state provide for certification to that court by a federal court of questions arising under the laws of that state which will control the outcome of a case pending in the federal court, this court, sua sponte or on motion of a party, may certify such a question to the state court in accordance with the rules of that court, and may stay the case in this court to await the state court's decision of the question certified. The certification will be made after the briefs are filed in this court. A motion for certification shall be included in the moving party's brief.

Illinois Supreme Court Rules:

Ill.Rev. Stat. Ch. 110A, Sec. 20 (Effective August 1, 1992), Supreme Court Rule 20 –

Certification of Questions of State Law from Certain Federal Courts

Text of Rule Effective August 1, 1992

(a) Certification. When it shall appear to the Supreme Court of the United States, or to the United States Court of Appeals for the Seventh Circuit, that there are involved in any proceeding before it questions as to the law of this State, which may be determinative of the said cause, and there are no controlling precedents in the decisions of this court, such court may certify such questions of the laws of this State to this court for instructions concerning such questions of State law, which certificate this court, by written opinion, may answer.

(b) Contents of Certification Order. A certification order shall contain:

(1) the questions of law to be answered; and

2) a statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose.

(c) Records Before Certifying Court. This Court may require the original or copies of all or any portion of the record before the certifying court to be filed with it, if, in the opinion of this court, the record or a portion thereof may be necessary in answering the questions.

(d) Briefs and Argument. Proceedings in this court shall be those provided in these rules governing briefs and oral arguments, except that the time for filing briefs specified in Rule 343 begins to run from the day this court agrees to answer the certified question of law, and the parties retain the same designation as they have in the certifying court.

(e) Costs of certification. Fees and costs shall be the same as in civil appeals docketed before this court and shall be equally divided between the parties unless otherwise ordered by the certifying court.

Amended April 1, 1992, eff. Aug. 1, 1992.

STATEMENT OF THE CASE

The plaintiffs in this case are Alexis Doe and her parents, David and Linda Doe, and John Doe with his parents, Jay and Cindy Doe. Alexis and John Doe were two three-year old children, unrelated, who the trial court found had been sexually abused at Scott Air Force Base Day Care Center. The trial judge for the Southern District of Illinois (The Honorable William Beatty, Jr.) found the government liable under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(B), 2671 *et seq.* in the amount of $25,000 per child and dismissed the parents' claims other than for medical expenses.

On September 25, 1984, Alexis Doe was approximately three years old, one month. (Tr. 32). Her mother, Linda Doe, dropped Alexis off at the Scott Air Force Base day care center at 8:15 a.m. (Tr. 33) and returned to pick her up sometime between 3:15 and 3:30. (Tr.39).

While driving Alexis home from the center, Linda asked her daughter if she had made friends during the day and if she would like

to go back again. Alexis said she had made friends but she did not want to go back. (Tr. 42). A very nice teacher had put water on her "gina" because a purple man had poked it with a "scrape" and made it hurt. (Tr. 43). In response to her mother's questions about this incident, Alexis said that "the man had said he was sorry he hurt her, and that he had pulled his pants up and down, and then the mommy teacher had opened up her blouse and the man had peed on her titties." (Tr. 43) Alexis then told her mother that she had called and called her and that her mother wouldn't come. (Tr. 43). Up until this point Alexis had related her story in a matter of fact manner (Tr. 96), but she became angry and upset when she told her mother that she had called for her mother but her mother never came. (Tr. 111).

Upon arriving at the Doe family home, Linda removed her daughter's clothes and looked for evidence of abuse in Alexis's vaginal area. She found none. (Tr. 44). Linda Doe then called her husband, a pediatrician at Scott Air Force Base. He recommended that Alexis be brought immediately to the base hospital to be examined by the chief pediatrician, Dr. Dicheson. (Tr. 44). He gave Alexis a genital exam. (Tr. 188). No standard rape protocol (Tr. 45) or tests for sperm were conducted during this exam. (Tr. 206). Alexis told Dr. Dicheson that she was in a room with a man and a woman and that the man took his penis out of his pants. (Tr. 188). Dr. Dicheson found no physical evidence of sexual abuse (Tr. 191). He found that enough evidence was present of sexual abuse that a psychological examination of Alexis was warranted. (Tr. 217).

Linda Doe bought her daughter a sandwich to eat after her daughter had been examined by Dr. Dicheson. Eating the sandwich triggered another memory for Alexis. Alexis then told her mother that earlier "the purple man had put his penis in her mouth and peed in her mouth and made her throw up her sandwich." (Tr. 55). The evening of the 25th, when Linda Doe, an R.N. (Tr.32), was giving her daughter a bath she found a needle mark on her daughter's big toe. When she asked Alexis about the mark Alexis said that the people had given her a shot in her toe because she was screaming and crying and making too much noise. The people told Alexis that if she kept making noise they would give her another shot. (Tr. 56). Prior

to this incident Alexis had never made any complaints of this nature. (Tr. 81) Her father stated that everybody was in shock by the information coming out of a little girl who had only learned to speak clearly six months prior to the incident. (Tr. 245).

The Does went to the police station on the base and an exhaustive investigation ensued.

The Air Force's Office of Special Investigation called in the Illinois Department of Children and Family Services (DCFS) to assist in their investigation. The OSI assigned the DCFS the task of interviewing the children (Tr. 815), which was done through the Rape and Crisis Center at Southern Illinois University-Edwardsville. Later that same day Alexis was interviewed there by Pam Klein, a sexual abuse counselor. Pam Klein is a counselor and therapist with twelve years experience (Tr.386) who specializes in physically and sexually abused children. She has a B.A. in psychology and an M.A. in counseling education. (Tr. 385). During this interview, Pam Klein said she,

> "asked her [Alexis] if these dolls could help her show us what happened to her, and she undressed the dolls and took the little— the penis which is tiny on the doll, and worked for a very long time to try to get it into the vagina of the doll, and she was totally self-absorbed in that activity to the point where she — you know, it was almost like we weren't even there." (Tr. 405).

On the basis of Alexis's treatment at the center (about fifteen treatment sessions), Pam Klein believed that, "Alexis was sexually abused, that she had experienced oral copulation [sic],and that she had a penis around her vaginal area, and that she experienced visually seeing two adults having intercourse to the point where she could describe the penis going into the vagina." (Tr. 420). Ms. Klein arrived at this conclusion because, Alexis's "emotional status was consistent with the children who disclosed these kinds of things, and her consistency of statement throughout." (Tr. 420).

Ms. Klein stated that children who are sexually abused tend to develop post-traumatic stress disorder and traumatogenic stigmatization. (Tr. 429). This may result in the child developing distressful or phobic behaviors around sexual issues.

> Ms. Klein explained that, "such a child may ... become fascinated by sexual things and begin to manifest an overt kind of morbid curiosity about sexual things, and at the same time become very phobic around any sexualized behavior seeing it as fearful because they have been given a message that sex is something that is hurtful....They also feel a stigmatization about being abused in that they know that they are different. .... In addition to that there is an incorporated sense of betrayal in that the people that you look to for trust and care as a child were not trustworthy and they hurt you...." (Tr. 430).

Ms. Klein said that the behavior Alexis was exhibiting was consistent with that of a child who had been sexually abused. (Tr. 431) Ms. Klein stated that since Alexis was still exhibiting this kind of behavior, Alexis would benefit from further therapy. (Tr. 432).

On November 18, Dr. Gerwell interviewed Alexis Doe. (Tr. 929). Dr. Gerwell is a Major in the Air Force and a clinical psychologist with a Ph.D. in adult clinical and child school psychology. At some point Linda Doe was asked to enter the room in order to provide reassurance for her daughter. (Tr. 950). Alexis re-enacted and described having a penis placed in her mouth and becoming ill and vomiting. (Tr. 931).

In the months which followed September 25th, although her initial story remained consistent, Alexis revealed the following details of the incident. The people had squashed her in between them and the man had rubbed his penis on her stomach. The man had touched the lady's titties and the mommy teacher had done "ballet" on the purple man. The lady had said that when she got to be a woman or grown up Alexis could do "ballet" on the man as well. (Tr. 67). As far as Linda Doe knew, Alexis had never seen in person or in film adults having sexual relations. (Tr. 66).

Immediately following September 25, Alexis was "very depressed, very quiet, withdrawn, and despondent." (Tr. 75). For several months Alexis would masturbate on her bed with two dolls. (Tr.76). "She would rub her vagina where the dolls' vagina would be, and there was always three of them." (Tr. 76). Although she no

longer participates in these sessions, Alexis still acts out intercourse with her dolls, Barbie and Ken. (Tr. 77). Unlike the other children in the family, Alexis is very uncomfortable with displays of affection between her parents. She becomes anxious and angry when her parents kiss hello or goodbye. (Tr. 232-3) Alexis tells her parents that such behavior is nasty and dirty. (Tr. 77). David Doe said that Alexis is "deathly afraid of anyone vomiting." (Tr. 233-234). She is intrigued and interested by sexual innuendo on the television. (Tr. 79).

On October 19, 1984, after reading an account in the base newspaper of the allegations of sexual abuse occurring at the Air Force day care center, Cindy Doe decided to question her son, John Doe, about whether he had ever been touched or ever had anything bad happen to him. (Tr. 356). He said a man and a lady had touched him and pointed to his penis and to his bottom. (Tr. 356). At this time John Doe was three years old. (Tr. 269). He became very angry and uncomfortable while he told his mother this story. (Tr. 357).

On October 30, 1984, John Doe's parents contacted Scott Air Force Base's commander (Tr. 360), and an investigation ensued. The Does took John to the Rape Crisis Center in Edwardsville for an interview upon the advice of the Air Force (Tr. 363,364). In this interview, John disclosed that a finger had been inserted into his rectum as well as having been touched on his penis and his bottom. (Tr. 270). He was anxious, nervous, and distracted while talking about events that happened at the day care center. (Tr. 277). He revealed that the "bad people" had threatened him if he ever told anyone what had happened to him. (Tr. 512). He continued therapy weekly at the Crisis Center until April 1985. (Tr. 371-2).

Since October, John developed a pattern of play that was angry and violent. (Tr. 373). He became obsessed with swords, guns, sharks, snakes, knives and other similar objects. (Tr. 374). He watches violent shows on television and becomes angry easily. (Tr. 507). He has difficulty getting along with other children. (Tr. 507). Since October 19, 1984, he has experienced night terrors regularly. The night terrors were somewhat like nightmares but the parents were unable to wake John up for 20 minutes to a half hour and were

accompanied by uncontrollable crying. (Tr. 376,505). At first the night terrors occurred about once a week, and then subsided gradually, with frequent recurrences until 1989. (Tr. 377). John attend[illegible]therapy sessions for the night terrors for about two and a half years. (Tr. 505).

The security at the Scott Air Force Base Day Care Center was negligible in 1984. Outside doors leading to all the rooms at the center were unlocked. (Tr. 259). No alarm system for these outer doors was in place. The grounds of the day care center were unfenced except for the playground, which had many gates which were kept unlocked. (Tr. 261). At one time an unfamiliar bearded man was seen entering the building by one of the employees. (Tr. 1002) He told the employee that he wanted to take one of the children shopping. The man had to be escorted away and was eventually barred from entering the base. (Tr. 1003). A binder kept at the entrance of the center had the names of the children and how long they would stay recorded in it. The binder was often left unattended where anyone could read it, and the parents were not always required to sign their children out. (Tr. 588) Criminal background or general background checks were not done on the day care center employees (other than the director). (Tr. 262). A janitor who worked at the center had a public record of child abuse and admitted to abusing three or more children at the day care center since his employment had begun and to molesting many other children in the community at large before his employment. (Tr. 222) The director was unaware of this criminal record until the investigation of the Doe families' allegations. Cox stated that the Air Force in general, and Scott Air Force Base in particular had no specific guidelines for security measures or regulations dealing with identification or reporting of child abuse. (Tr. 638-40).

Following the verdict for plaintiffs on October 10, 1990, all parties appealed. The trial court was affirmed by the United States Court of Appeals for the Seventh Circuit on October 1, 1992, 976 F.2d 1071, and plaintiffs' Petition for Rehearing and Rehearing *In Banc* was denied on January 21, 1993.

REASONS FOR GRANTING THE PETITION

The sexual abuse of children and its effect on the child and the child's parents is a subject that was taboo in this society until recent revelation of its widespread occurrence and effect. This case presents to the Court an opportunity to address these issues of national impact and set standards for the burgeoning area of trauma and its accompanying litigation. The trial court and the Appellate Court decisions should be reviewed by this Court because they result in (1) a substantial change in the law of evidence requiring insurmountable obstacles to recovery by those traumatized by sexual abuse; (2) a complete denial of recovery to parents by these courts because they incorrectly interpret the viability of the tort of seduction in Illinois, and by inference, in the remainder of this country; and (3) the award in this case should be reviewed by this Court as it is so low as to be shocking to the conscience.

1. THE EFFECT OF THE APPELLATE COURT DECISION IS TO REQUIRE EXPERT OPINIONS IN EVERY CASE OF SEXUAL ABUSE TO PROVE A CAUSAL LINK BETWEEN THE CHILD'S ABNORMAL BEHAVIOR FOLLOWING ABUSE AND TO ESTABLISH FUTURE DAMAGES. IT ALSO CONCLUDES THAT SUCH TESTIMONY MUST BE ABSOLUTE AND DEFINITE. FINALLY, THE DECISION IS INCORRECT IN ITS STATEMENT THAT THERE WAS NO EVIDENCE INCLUDING CIRCUMSTANTIAL TO SUPPORT AN AWARD FOR FUTURE TRAUMA.

Both the Court of Appeals (decision at 30) and the trial court seem to be searching for an expert witness who will tell them unequivocally that the behavior of these children is definitely caused by their sexual assault and is not affected by any other event in their lives before allowing these children to recover substantial damages. The law does not require such precision; the Courts are not entitled to such relief from decision making.

Judges and juries have been assessing damages for physical and emotional pain and suffering since the beginning of our legal system

without more evidence than that provided by the victims themselves.

The evidence provided by the parents and the other witnesses in this case as to the children's behavior before the sexual molestation and following should leave little doubt in this Court's mind as to causation. Hoping that "... in the future, experts will develop new methods for assessing damages..." is merely an excuse for refusing to accept the responsibility of being fact finders and damage assessors which judges and juries have been required to accept since the beginning of our judicial system. Yes, it is difficult, but hopefully this Court will not allow trial courts to avoid their responsibility because it is difficult or imprecise to decide. Fact finders are permitted to draw inferences based upon their own observation and experience in the ordinary affairs of life. The fact finder may base its verdict upon a preponderance of all the evidence not merely that supplied by expert testimony. *Scholle vs. Continental National American Group*, 44 Ill.App.3d 716, 358 N.E. 2d 893, 3 Ill.Dec. 350, 355 (2d Dist. 1977). Pain and suffering, physical or emotional, has never been exactly quantifiable. It may never be. These children cannot wait for the court to someday receive a magic yardstick to measure their hurt. Nothing is different regarding assessing their pain and suffering from sexual assault as opposed to the pain and suffering from physical injury except the source. Speculation has its place in estimating damages and doubt should be resolved against the wrongdoer. *Olympia Equipment Leasing vs. Western Union Telegraph*, 797 F.2d 370, 383 (7th Cir. 1986).

EXPERT TESTIMONY IS NOT NECESSARY TO ESTABLISH A PLAINTIFF'S RIGHT TO DAMAGES FOR EMOTIONAL PAIN AND SUFFERING; DAMAGES FOR PERMANENT INJURIES; OR AN AWARD FOR FUTURE DAMAGES.

EXPERT TESTIMONY IS NOT REQUIRED TO PROVE MEDICAL DAMAGES.

Both the trial court and the Court of Appeals' decisions require expert testimony to prove damages in this case. It has never been

required and this Court should review this case to prevent this substantial change in the law of evidence.

A plaintiff or other lay witness may testify as to his own opinion as to the source and severity of the plaintiff's injuries and the plaintiff need not produce a physician to prove the injuries. *Turner vs. City of Chicago*, 95 Ill. App. 2d 38, 238 N.E. 2d. 100, 101-102 (1st Dist. 1968). These children through their parent's testimony have provided adequate proof of their injury and its source. None of their symptoms were present until immediately after the sexual molestation. There is no evidence of any other cause. Evidence of good health prior to an accident and illness and poor health immediately following it is sufficient evidence from which a fact finder may legitimately conclude that the condition of ill being was caused by the accident. The injured party is not required to disprove every alternative hypothesis suggesting a cause other than the Defendant's negligence in order to recover damages. *Vilardo vs. Public Taxi Service, Inc.*, 118 Ill. App.2d 62, 254 N.E.2d 653, 654 (1st Dist. 1969).

The extent of intangible harm may be established solely by the testimony of the Plaintiff or someone who has had the opportunity to observe the Plaintiff for a considerable period of time as the parents did in this case. *Crumble vs. Blumenthal*, 549 F.2d 462, 467 (7th Cir. 1977).

Emotional damages may be inferred from the circumstances of a particular case. *Phillips vs. Hunter Trails Community Association*, 685 F.2d 184, 190 (7th Cir. 1982). No more should be required than is possible.

REQUIRING AN EXPERT WITNESS TO STATE WITH LEGAL EXACTITUDE THE CAUSE OF PLAINTIFFS' INJURIES IS ERROR. AN OPINION THAT THE DEFENDANT'S NEGLIGENCE MIGHT OR COULD HAVE CAUSED THE SYMPTOMS DISPLAYED IS SUFFICIENT TO SUPPORT A VERDICT IN THE PLAINTIFFS' FAVOR

All of the expert witnesses who testified including Dr. Gerwell, consistently testified that the emotional trauma displayed by the

children might or could have been caused by their sexual molestation and might or could continue in the future.

An expert in a non-legal field is not required to use any particular legal talismanic incantation to present his testimony. The use of the terms "possible" and "might" are satisfactory when giving opinions on medical causation or medical permanency, and testimony that a certain occurrence might or could have caused Plaintiff's symptomology or that an injury might or could cause damages in the future or permanently is not speculative. The fact finder may reasonably infer from such testimony that the children's problems were caused by the sexual molestation and would continue to cause them problems in the future. *Robinson vs. Chicago Transit Authority*, 69 Ill.App.3d 1003, 388 N.E.2d 163, 26 Ill.Dec. 539, 543 (1st Dist. 1979). It is for the fact finder to weigh the evidence and base his decision upon it. There are no grounds to disregard it. *Placher vs. Streepy*, 19 Ill.App.2d 183, 153 N.E.2d 369, 372 (2d Dist. 1958). "When a doctor is asked to base his opinion on a reasonable degree of medical certainty, the certainty referred to is not that some condition in the future is certain to exist or not exist; rather the reasonable certainty refers to the general consensus of recognized medical thought and opinion concerning the probabilities of the condition in the future based on present conditions." *Redmon vs. Sooter*, 1 Ill.App.3d 406, 274 N.E.2d 200, 204 (3d Dist. 1971).

A PARTY RELYING UPON CIRCUMSTANTIAL EVIDENCE TO PROVE DAMAGES IN A CIVIL CASE NEED NOT NEGATE EVERY OTHER POSSIBLE CAUSE FOR THE DAMAGE TO RECOVER FOR THOSE DAMAGES.

THE EVIDENCE IS THAT THE SEXUAL ATTACKS ON THESE CHILDREN MIGHT OR COULD HAVE CAUSED THEIR EMOTIONAL DAMAGE WHICH MIGHT OR COULD CONTINUE INTO THE FUTURE

The testimony of the parents and all treating or examining witnesses in this case testified consistently, except that the Air Force

witness, Dr. Gerwell, made the unsupported conclusion that there would be no future damages to these children. The Courts below stated that no witnesses except the parents and Pam Klein are unqualified in their testimony. They need not be. The Plaintiffs', or as here, Plaintiffs' parents', testimony, standing alone without medical testimony as to the children's pain is sufficient without more to make a prima facie showing of damages. While the burden of proof always stays with the Plaintiffs' once a prima facie case is established, the burden of going forward with the evidence to show that Plaintiffs were either not injured or not injured to the extent claimed shifts to the defendant. *Turner vs. City of Chicago*, 95 Ill.App.2d 38, 238 N.E. 2d. 100, 101-102 (1st Dist. 1968).

It is the government, not the Plaintiffs, who has failed in its burden to discredit Plaintiffs' prima facie case on the question of damages. Dr. Gerwell says other unspecified things may have caused the children's symptoms, but there is no evidence of any other cause. The trial court said it "... can think of all kinds of things that would cause..." these symptoms in these children but he may not so speculate. There is no evidentiary basis for him to do so. The appellate court and the trial court found Plaintiffs' evidence to be less than 100% positive. That is true but it is the only evidence and the only testimony in this case as to the cause of these children's behavior. It is uncontradicted. Unless it is inherently unbelievable, uncontradicted testimony is not to be disregarded. *Cosmopolitan Bank vs. County of Cook*, 103 Ill.2d 302, 469 N.E.2d 183, 82 Ill.Dec. 649, 655 (1984). It is the trial court and the appellate court which speculate, not the plaintiffs.

There is no evidence in this case that these children's trauma was caused by anything other than their sexual molestation. Dr. Gerwell's theorizing and Judge Beatty's imagination notwithstanding, there is no such evidence.

WHAT IS THE CORRECT DEFINITION OF CIRCUMSTANTIAL EVIDENCE?

DIRECT AND CIRCUMSTANTIAL EVIDENCE SUPPORTS PLAINTIFFS' CASE FOR DAMAGES PAST, PRESENT AND FUTURE

This appellate court and the trial court held there was no evidence in this case, direct or circumstantial, of causation connecting the behavior of the children to their sexual molestation nor to support an award for future damages.

Circumstantial evidence is proof of facts or circumstances which give rise to a reasonable inference of the truth of the facts sought to be proved. *Walsh vs. Dream Builders*, 129 Ill.App. 2d 280, 264 N.E.2d 247, 250-251 (1st Dist. 1970). It is the duty of the trier of fact to make these inferences, not an expert witness.

Circumstantial evidence is sufficient, either alone or in combination with direct evidence, to prove any element of a case and may even contradict and overcome direct and positive testimony. The only limitation is that the inference drawn must be reasonable. There is also no requirement that the circumstances to justify the inferences sought, negative every other possible conclusion. "The law is not so exacting that it requires proof of...causation by testimony so clear that it excludes every other speculative theory." *Musgrave vs. Union Carbide Corporation*, 493 F.2d 224, 228 (7th Cir. 1974).

Medical causation may also be proved in whole or in part by circumstantial evidence. *Scholle vs. Continental National American Group*, 44 Ill.App.3d 716, 358 N.E.2d 893, 3 Ill.Dec. 350, 355 (2d Dist. 1977). Evidence that future damages are reasonably certain to occur may also be inferred simply from the nature of the injury or disability. *Burnett vs. Caho*, 7 Ill.App.3d 266, 285 N.E.2d 619, 627 (3d Dist. 1972).

The evidence in this case is that the complained of behavior patterns of both children did not begin until shortly after their sexual molestation. There is no evidence of any other cause. Every professional witness states that the sexual molestation might or could have caused the behaviors. The parents, one of whom was a pediatrician, said that this was the only cause. The trial court not only could have

inferred from these circumstances, he had to infer from these circumstances a causal connection between the sexual abuse and the behaviors because Plaintiffs established a prima facie case and shifted the burden of going forward with the evidence to the government. The government was unable to introduce any evidence, direct or circumstantial, to account for the behaviors and the cause and effect relationship is not inherently improbable. Weight of evidence is not a consideration at this point as the only evidence presented is Plaintiffs'. Where there is only evidence on one side of the scale there is nothing to compare it with.

"Where, as here, there exists limited medical knowledge of a malady, we have recognized that medical testimony pertaining to causation may not be unqualified and unequivocal (citations omitted) 'proof of the state of health of the [Plaintiff] prior to and down to the time of the injury, and the change immediately following the injury and continuing thereafter, is competent as tending to establish that the impaired condition was due to the injury.'" *National Casting Division Midland-Ross vs. Industrial Commission*, 55 Ill.2d 198, 204 (1973). The trial court and the Appellate Court are in error.

2. THE TORT OF SEDUCTION IS STILL A VIABLE CAUSE OF ACTION IN THE STATE OF ILLINOIS.

Plaintiffs, the parents of the minor plaintiffs, seek to recover for the emotional and psychological trauma they have suffered due to the sexual molestation of their minor children. Sexual molestation, however, is a unique injury in that its principal damage is emotional not physical. Most cases of sexual molestation are not accompanied by physical injury to any great degree. There are cases where extraordinary force and brutality accompany the molestation due to the molester's peculiar brutal deviation or because of the force required to accomplish the molestation. These situations are the exception rather than the rule. Therefore it is not surprising that here the actual physical trauma to these toddlers was minimal.

The psychological trauma of the sexual molestation is the principal trauma in most cases. It is also peculiarly psycho- traumatic to the entire family unit since it is focused on the most private part of

everyone's life and the part which holds a family together, resulting in the formation and growth of the family. It is an intrusion on the privacy of a family's most intimate aspect, coloring forever the relationships within the family unit.

The courts have recognized the unique damage to the family caused by a sexual assault on one of its members and have allowed parents to recover for their emotional trauma when a child is sexually molested since the earliest days of the common law. One of the earlier reported cases found was *Bennett vs. Allcott*, T.R. 166, 100 Eng. Rep. 90 (1797).

The earliest mention of the adoption of the doctrine in Illinois is the case of *Ball vs. Bruce*, 21 Ill. 161 (1859). Here, the male plaintiff brought an action against the defendant for the seduction of his minor, orphaned, sister-in-law who was under his care and in his service. The minor became pregnant and the plaintiff alleged that he incurred medical expenses in caring for her and lost her services for a period of time. *Ball*, at 161.

The court held that a case for seduction may be maintained by a parent or, in this case, a person standing *in loco parentis* for debauching a daughter, *Ball*, at 161, so long as the minor is under the control of, and may be required to perform service for the plaintiff. Evidence of acts of service need only be slight, such as making tea and proof of service was required by the court. *Ball*, at 162.

Once a loss of slight service was established, the jury was entitled to award the plaintiff damages for ". . . the wounded feeling of the parent, the disgrace brought upon the family, and the loss of society of the child". *Ball*, at 162.

The only other case in Illinois dealing with this theory of recovery is *White vs. Murtland*, 71 Ill. 250, 265 (1874), where the court, in keeping with the development of this area of the law in other jurisdictions, held that it was only necessary to show that the parent or other plaintiff had the right to request service from the molested minor to recover. No proof of actual service to the parent was to be required henceforth for the plaintiff parent to recover the resulting

damages, including the parent's mental anguish. Neither case has been overruled, nor limited in any subsequent decision.

The law continued to develop, however, in other jurisdictions premised upon the same common law origin. *Noice vs. Brown*, 39 N.J.L. 569 (N.J.S.Ct. 1877), was an action by a widowed mother for the sexual molestation of her minor daughter. *Noice*, at 570. The court held that this offense of seduction ". . . where no special damages are laid, [is], obviously, strictly personal, being [a remedy], mainly, for wounded feelings. Feeling being as much a part of the person as the physical frame, no reason appears why an injury to the former is not as much a tort to the person as an assault would be.

The wrong is of a two fold character, wounding the person in his feelings, and affecting his property rights, resting, as it does, on the technical ground that, by the injury, he lost a service of some pecuniary value." *Noice*, at 571.

In keeping with the earlier Illinois position, the court held that for a parent to recover damages ". . . it is well settled that no proof of service is necessary beyond that implied from the fact of the daughter living in her father's house as a member of his family . . . ." *Noice*, at 572.

The courts of Arkansas have also spoken on the issue in *Breining vs. Lippincott*, 187 S.W. 915 (Ark. S. Ct. 1916), which was, again, a suit by a widowed mother for the debauchery of her minor daughter wherein the mother sought to recover for, and alleged, that she suffered ". . . great and untold humiliation . . . and [was] deprived . . . of the services, companionship, and society of her daughter . . ." as well as her daughter's medical bills. *Breining*, at 915.

The court there held that

> ". . . the rule of law which only permits a parent to recover damages for the debauchery of a minor daughter because of his relation as master, and not that of parent is . . . `but little more than a fiction' and, being such, it should be and is no longer recognized by the best of modern judicial thought as the essential basis of a party's action for the debauchery of a minor child. The real and substantial basis for the recovery should be

the personal injury which the parent sustained in his capacity as parent and not as master." *Breining*, at 917.

Thus, it can be seen that the cause of action which was first based upon the theory that the parent, as master, had lost the service of his child/chattel/servant was, by 1916, totally replaced with a cause of action for a parent for the emotional distress caused the parent by the sexual molestation of his or her child without the need to show any actual damages from loss of service.

The Supreme Court of North Dakota spoke to the issue in *Dwyre vs. Stearns*, 172 N.W. 69 (1919), which was an action for the sexual molestation of a minor daughter brought by a widowed mother again. Here the mother sued for her loss of society and comfort of her daughter, the shame, humiliation, and disgrace occasioned to her, as well as her experienced loss of services. *Dwyre*, at 69-70. Here also, for the first time, no pregnancy occurred and the legal fiction that loss of service is required is abandoned forever. *Dwyre*, at 71. The court held that "the thought that the wrong perpetrated by the seduction of the daughter must be measured by the actual loss of services sustained by a parent, and must so be compensated, shocks the finer sense of humanity and morality. We do not hesitate to announce and adopt the rule of damages generally stated, namely, that when the technical basis of actual or constructive loss of services has once been established, damages may be recovered from all that the parent may suffer by the ruination of the daughter, and the disgrace to the family . . . this includes not only loss of services but also the dishonor and mental suffering brought upon the household . . . ." *Dwyre*, at 71.

Berghammer vs. Mayer, 207 N.W. 289 (W.I.S. Ct. 1926), was an action by a parent for the seduction of his minor daughter where the trial court limited the parent to actual pecuniary loss. No evidence was introduced for medical expenses, though there was evidence that the child was unemployed for a period of time due to pregnancy and thereby lost wages. The trial court limited the jury to these elements of damage, holding that damages which result from the parent's shame, humiliation, disgrace, etc., are to only be recovered

as punitive damages. The Supreme Court of Wisconsin disagreed and held that the damages for wounded feelings and affections, the parent's sense of shame, humiliation and disgrace for the wrong done him or her in his or her social and family relation and the stain and dishonor brought on the family are all reasonable as compensatory damages. *Berghammer*, at 290.

The court also held that damages may be recovered for the wounded honor of the family and on account of the anxiety of the parent for his or her other children. *Berghammer*, at 291.

Stone vs. Bang, 122 S. 95 (Miss. Ct. 1929) is based upon statute. The statute in question, however, was merely a re-statement of the common law. Here, too, the court held that a parent could recover for his or her mental anguish caused by the sexual molestation of his or her child. *Stone*, at 97.

Collins vs. Hoskins, 306 Ky. 391, 208 S.W. 2d 70 (C.A. 1948) is the most recent case plaintiffs could find on the subject. Here a father sued for damages for the seduction of his minor daughter, and the plaintiff was allowed to recover under the common law theory.

> " 'A perusal of the books shows how difficult it is for the judicial mind to emancipate itself from forms sanctioned by age and long experience. But courts cannot stand still, and observe society in the march of improvement toward higher development of morals, and a more refined appreciation of its varied relations. Jurisprudence must expand its principles, and their applications, so to keep in harmony with the necessities of advancing society . . . The true relation to parent and child, is that of protection, nurture and education, on the one side, and dependence, filial affection and obedience on the other . . . The family is the oldest institution among men; out of the aggregation of these lesser communities, the state and the nation is made up; whatever tarnishes the purity and honor of . . . [its] members, whilst entailing disgrace and suffering upon the family, also in its effects is a public wrong. That system of jurisprudence which punishes in damages the slightest aggression upon property, but denies redress to the . . . [parents] for

the defilement of an infant . . . is at variance with the sentiments and conscience of this age.' " *Stone vs. Bang*, at 96-97, citing *Ellington vs Ellington*, 47 Miss. 329.

The sexual molestation of a minor daughter of child-bearing age is a horrible, mind-numbing injury to a family. How much more horrible is that trauma when the child is only three? What difference that the child is male or female?

"The law is surely not so impotent in its power to protect the weak and inexperienced against the wicked and depraved, as not to punish such wrongs by inflicting damages, commensurate to the injury." *Ball*, at 163.

THE UNITED STATES COURT OF APPEALS SHOULD HAVE DEFERRED TO THE ILLINOIS SUPREME COURT ON THE QUESTION OF THE VIABILITY OF THE TORT OF SEDUCTION AND REFERRED THE QUESTION TO THE ILLINOIS SUPREME COURT FOR THEIR DECISION PURSUANT TO COURT OF APPEALS RULE 52 AND ILLINOIS SUPREME COURT RULE 20.

While this cause was pending, after argument but before decision, 7th Circuit Rule 52 was adopted providing for certification of state law questions which will control the outcome of a pending case, *sua sponte* or on motion of a party, to the state court.

The Illinois Supreme Court adopted Supreme Court Rule 20, Chapter 110A, Sec. 20, Ill.Rev.Stat., effective August 1, 1992, which provides for certification of a question of Illinois state law pending before the Court of Appeals which may be determinative of a cause to the Illinois Supreme Court where there are no controlling precedents in the decisions of the Illinois Supreme Court. The continued validity of the tort of seduction in Illinois is such an issue.

The Appellate Court should have allowed the Illinois Supreme Court the opportunity to reexamine the tort based upon the later cases cited which move the cause of action to one for the parent's emotional trauma resulting from the injury to their child.

The decision as to whether or not to continue this cause of action, its development and its basis are uniquely public policy issues that, given their importance to the people of Illinois and the frequency of child abuse now known, more properly should be decided by the Illinois Supreme Court.

Finally, the Court of Appeals' analysis of the plaintiffs' case resting upon the tort of seduction as an intentional tort rather than under the theory that the government negligently allowed it to occur is contrary to its prior holding in the first appeal in this cause, *Doe v United States*, 838 F.2d 220 (7th Cir. 1988), and this Court's opinion in *Sheridan v. United States*, 487 U.S. 392, 108 S.Ct. 2449 (1988).

3. $25,000.00 IS SHAMEFULLY INADEQUATE FOR THE CRIME THE GOVERNMENT ALLOWED TO OCCUR

If the humiliation one suffers from being denied the right to purchase a $675,000.00 home because of his race is worth $10,000.00 [*Phillips* at 191], the rape of a three year old child is certainly worth more than $25,000.00. The fact that the blatant inadequacy of this award does not shock the conscience of the Appellate Court shocks these Plaintiffs and their counsel. It does not require pages of testimony and twenty-five experts to tell anyone how they would feel if they had a loved one raped. It does not require the wisdom of Solomon to note the devastation in these families.

The fact finder may always make inferences based upon his or her own observations and experience in the ordinary affairs of life in reaching a verdict including damages. Compensatory damages may be awarded for emotional damages and there need not be medical evidence to sustain it. *Seaton vs. Sky Realty Company, Inc.* 491 F.2d 634, 636-638 (7th Cir. 1974); *Scholle*, at 355.

THE COURT CAN AND SHOULD LOOK TO RECOVERIES IN OTHER CASES TO DETERMINE IF A PARTICULAR AWARD IS ADEQUATE

The Appellate Court chose to ignore the numerous other child sexual abuse cases where recoveries were enormously higher cited in the appeal of this case saying that would not be proper.

Bollard v. Mother's Helper, Inc., Va., Norfolk Circuit Court, No. L 85-2217 (Nov. 24, 1986). Two-year-old sexually abused by sons of day care operator awarded $828,000 by jury for psychological trauma and permanent emotional scarring.

Johnson v. State of Iowa, Iowa, Pottawattamie County District Court, No. 5624 (Nov. 9, 1987). Eight former and current students at Iowa School for Deaf sued school for damages from physical and sexual abuse. Plaintiffs suffered from post-traumatic stress syndrome, exhibited hostility, change in sexual identity, and depression. The parties settled for $2 million.

Spann v. Tyler Independent School District, U.S. District Court, E.D. Tex., No. TY-6-213-CA, (March 25, 1988). Six-year-old sexually abused by bus driver was awarded $237,000 plus attorney's fees by the jury. Boy suffered from chronic post-traumatic stress syndrome.

Brown v. Brown Ikershow Co., S.C. (1983) $30 million jury verdict.

Clarke v. Boy Scouts of America, ATLA L. Rep. (April, 1981). Jury award of $651,744.

Phillips v. Day, U.S. District Court, E.D. Va., (1988). $850,000.

It certainly did not stop the Seventh Circuit from doing so to justify a reduction of a Plaintiff's recovery for emotional trauma from $25,000.00 to $10,000.00 in the *Phillips* case cited above, where the court reviewed all of its decisions in housing discrimination cases and cited that as its basis for decision. *Phillips* at 190-191.

Utilizing the same mathematics that the Appellate Court utilized in *Phillips* [prior awards ranged between $500.00 and $5,000.00 *Phillips* at 190]. It could have as easily justified a verdict for twice the highest amount cited by Plaintiffs, $30 million or twice the lowest verdict cited, $237,000.00.

The record does not support the district court's award of such minimal damages to John and Alexis Doe.

Permanent and Future Damages—John Doe

Since John Doe informed his parents about unknown persons fondling him at the "nursery," (Scott Air Force Base Day Care

Center) he has experienced night terrors, often engages in violent behavior and has "an absorption with violent themes in his play." He is obsessed with knives, guns, and swords and insists on carrying them with him whenever he is not in school. (Tr. 375). He was irritable, moody, had a low frustration tolerance, and was obsessed with sharks for a while, watching the movie *JAWS* about 100 times over a few months. Moreover, he has difficulty interacting with other children. He had been under the care of a clinical psychologist for two and a half years because his night terrors were becoming so frequent that his parents became very alarmed. The sessions stopped only after the clinical psychologist felt that the night terrors were under control.

Clearly John Doe is a troubled child. The emotional trauma inflicted upon John by the sexual abuse was evident from the agitation, discomfort, and anger which accompanied his disclosures of the event. Dr. Gerwell concluded that John had been threatened or perhaps actually injured by the perpetrators of the abuse and that this had intimidated John to the point where he had great difficulty telling others about the incident. (Tr. 924). John felt so threatened by the abusers that he became anxious and very reticent when questioned about the event months afterwards in a setting where he knew he was safe from the abusers and where he knew it was safe to disclose what had happened to him.

Child abuse victims often do not reveal that they have been abused for years. John was discouraged from telling his parents about the abuse because he had been threatened by the perpetrators with injury if he told anyone. The amount of delay in relating the abuse is not directly related to the extent of the trauma. (Tr.444).

Here, John's symptoms surfaced soon after the event and are directly related to the event. No other plausible cause for the symptoms is in evidence.

The judge concluded that John and Alexis's problems, "could just as well be the result of sibling rivalry, and jealousy." (Tr. 17). There is no evidence to support that conclusion. The behavior John has exhibited since the event is unusual in children.

> "It would be one, two, three o'clock in the morning, we would hear John crying in his room with Tony.... We would take him downstairs because he was just screaming and crying uncontrollably, and we would carry him down the stairs and sit him on the couch, and we would look right in his eyes and we would say John and his eyes would be open and he would be looking right at us and we would say John, it's okay, wake up.... And it would take twenty to thirty minutes for him to finally realize that he was in his home, that he was with his parents and then he would go back to sleep. "

Testimony of John's father. (Tr. 552).

These night terrors did not happen once or twice but frequently, sometimes as often as weekly (Tr. 552) for a number of years. John required two and a half years of therapy before the night terrors were finally under control. Shortly after the event occurred John would have conversations with his father, conversations unlike those he had engaged in previously, (Tr. 555) which indicated that he was seriously affected by the abuse and the threats. One day John drew a picture of a snake and showed it to his father, Jay Doe. John told his father, "It's a snake.... and well, the bad people had it." "That's when he said, Dad would you kill the snake? ... He said would you kill the bad people?" (Tr. 557) The content of John's conversations links his preoccupation with snakes and violence to the "bad people" — his word for the perpetrators of the abuse. John's brother Tony, only a year or two his junior, does not have similar problems. The violent behavior, the night terrors began only after the abuse occurred, and had begun long before John's parents were divorced.

Mr. Kinsey, John's therapist, linked John's behavior to the abuse in two ways. First he listed types of behavior the psychology profession finds commonly exhibited in child victims of sexual abuse.

> "Frequently there's — you know, there's a recurring theme, a lot of fears, a lot of monsters, nightmares, afraid to go certain places, afraid of certain types of people. .... Some of these kids will develop aggressive behavior, some of them will develop

> very passive, withdrawn behaviors. Some of them will develop an over — an overly great effort to control their lives because they have felt that they've been violated and their lives have gotten out of control." "I have seen kids with abuse in their background, sexual or physical abuse, who do have quite a fixation with monsters and big-toothed demons and animals and things like sharks and wolves."

Mr. Kinsey further stated that John's night terrors, marked changes in mood and difficulty with frustration and so forth and preoccupation with sharks and monsters were consistent with child abuse. Secondly, it was the opinion of the clinical psychologist that John's night terrors were caused by the Scott Air Force Base incident.[1]

John's therapy continued up until three months before trial. If John's difficulty in getting along with other children (including striking them), his obsession with violence, and using guns and knives continue, it seems evident that John will need future therapy when he reaches an age where such behavior becomes potentially dangerous.

Likewise, the judge's ruling that there was no evidence of future damages in this case and no evidence which tends to show that John

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[1]Mr. Kinsey testified that in play therapy, the technique he used with John, he identifies conflicts the child is dealing with by looking for recurrent themes in their play. Children may resolve these conflicts unconsciously through their play. John acted out a specific scenario through his play with Mr. Kinsey every weekly session for a period of seven to eight weeks. In this scenario, John identified one of the people in his play as a boy, and the boy was taken away from school by a "bad man." "He would say things like the man— 'The man is hurting him.'" "— we have a little jail in the playroom, and the bad man was put in jail. And after the bad man was put in jail, then he for a few sessions was real concerned about the bad man and what would happen to him. Would he stay in jail, would he be good now so he could be let out, and so forth. That was a very, I think, meaningful play experience for John. ...after he had done that particular theme play several times the nightmares began to decrease and eventually go away. He behavior at home did become more stabilized and he was more reasonable in terms of how he interacted with the other members of the family and so forth."

Doe will have any need for future medical or psychological treatment," is clearly erroneous. Possible future damages are compensable if they are reasonably certain to occur. *Cummings v. Chicago Transit Authority*, 86 Ill. App.3d 914, 408 N.E.2d 737, 42 Ill. Dec. 159 (1st Dist. 1980). It is reasonably certain that John Doe will need future therapy for the emotional damage which took place because of the abuse. Sexual abuse of children is not a fleeting touching which results in no emotional scarring (Tr. 430-432, 482); its repercussions may be pervasive and damaging even if the child has no memory of the event itself.

Permanent and Future Damages — Alexis Doe

Alexis Doe, since being sodomized and thus induced to vomit at the Air Force Base, has become "deathly afraid of anyone vomiting." (Tr. 233). She for a while participated in bizarre sexual behavior with her dolls, masturbating with them by rubbing them up against her genitals, always with two dolls and herself.[2] The parallel between this behavior and her account that she had been sandwiched in between two adults who were lovemaking is easy to draw, and certainly more probably than not causally related to the sexual abuse. The plaintiffs produced uncontested evidence that to her parents' knowledge Alexis had not been exposed on television or in person to lovemaking. Alexis also exhibits an increased awareness of sexual innuendo on television that is age inappropriate[3], and

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[2] "After that maybe a couple of months after that, she masturbated a lot with her dolls on her bed, she would take all their clothes off and be like a third person with two dolls.... She would rub her vagina where the doll's vagina would be, and there was always three of them....Within the last year, ...,she didn't get on the dolls anymore and participate, but her dolls do have intercourse, she takes their clothes off and Barbie and Ken also have intercourse." testimony of Linda Doe. (Tr. 77).

[3] "I think she reacts very differently toward say some sexual innuendo on television. ...it's an intuitive kind of difference from my other children and children I have known.... She seems more intrigued, more interested, in a different way. There doesn't seem to be that sense of innocence or wanting to watch it to find out what are they doing, it's more...more aroused." testimony of Linda Doe, Alexis's mother. (Tr. 79).

becomes very uncomfortable with any displays of affection between her parents. (Tr. 232-3). Alexis believes that kissing hello and goodbye between her parents is "nasty."[4] Clearly, Alexis has permanently lost her childish innocence of sexual matters and has become confused about the distinction between sex and love.

This damage is apparent at Alexis's young age of seven, before she has had to deal with such issues as her own adult sexuality. Surely if the damage from the incident it making itself known now, the likelihood of future problems when Alexis reaches puberty and beyond is reasonably certain. Alexis's mother admitted that although she had not sought out therapy for her daughter at this point, that she would do so if Alexis's current behavior continues. (Tr. 80). Mr. Doe, a pediatrician feels the same way. (Tr. 236). Part of Mrs. Doe's reluctance to seek therapy for Alexis is not because Alexis has not suffered damages from the incident or that current behavior is not disturbing but because Mrs. Doe still hopes the Alexis's behavior will subside on its own although no evidence shows that this is likely. (Tr.81)

The other reason Mrs. Doe has hesitated to provide help for her daughter is that she fears therapy will reinforce the behavior (perhaps a mistaken belief) and because in her own words, "I want the private parts of my life left to me, I don't want it opened up to the Court and whoever wants it. " (Tr. 81).

Finally, the sexual abuse of Alexis had an impact on the family. This impact in turn has affected the quality of Alexis's life. How the family reacts to the fact that Alexis has been abused determines in some part how damaging the incident will be to her. Phil Hengen,

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[4] "She [Alexis] becomes very emotionally distraught whenever I kiss my wife, show any physical affection. She gets a very disgusted look on her face, and makes a comment like oh that's gross, and she will run out of the room, if she can, or then she usually pouts about it for awhile afterwards, frequently have to go in and reassure her and talk to her.... the thing that I feel (father is a pediatrician) is inappropriate about Alexis is the anger and anxiety that she has about it. It's not just, oh that's gross, giggle, giggle, or that sort of behavior I would consider normal." testimony of Alexis's father. (Tr. 232-3).

a professional counselor told the Does that the, "primary effects on Alexis from that point forward would be determined by how Linda and I did, that if our relationship fell apart and if our relationship became such the we became estranged from her.... that would be much more damaging." (Tr. 254). These are consequential damages recoverable under Illinois law.

Alexis's father testified that he withdrew emotionally from his daughter immediately following the event for a period of three to four months (Tr. 170). He withdrew so completely that he did not observe his daughter's behavior at all for the first three to four months. (Tr. 230). Alexis's parents are also overprotective of their daughter. They have moved to Fargo, North Dakota because it had one of the lowest crime rates in the country and they wanted to live someplace "safe." (Tr. 139). In addition, her parents do not allow her or the other children to do normal activities like going trick-or-treating (Tr. 169, 234). As a result Alexis is less mature than most kids her age and more fearful than most of being in a place where she is not protected. (Tr. 234).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 90-3762, 90-3763, 90-3764, 90-3765

JOHN DOE, ET AL.,
Plaintiffs-Appellees,
Cross-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant,
Cross-Appellee.

Appeal from the United States District Court
for the Southern District of Illinois.
Nos. 85 C 5630, 85 C 5631 — **William L. Beatty**, *Judge.*

ARGUED DECEMBER 11, 1991 — DECIDED OCTOBER 1, 1992

Before FLAUM and RIPPLE, *Circuit Judges,* and WILL, *Senior District Judge.**

FLAUM, *Circuit Judge.* The plaintiffs in these consolidated cases, two minor children and their parents, allege that during the fall of 1984 the children were sexually molested *by* unknown parties while in the care of the Scott Air Force Base Day Care Center ("Center"). The plaintiff children, although not related, are referred to as "Alexis Doe" and "John Doe." According to the plaintiffs' theory, while the Center employees did not necessarily perpetrate the abuse, they were negligent in supervising the children, thereby allowing Alexis and John to be abused by

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* The Honorable Hubert L. Will, Senior District Judge for the Northern District of Illinois, is sitting by designation.

an unknown person or persons. Following a bench trial, the court entered judgment in favor of the children and awarded each child $25,000 in damages. Jurisdiction is premised on the Federal Tort Claims Act (FTCA), 28 U.S.C. §1346(b).

I.

We begin with an abbreviated overview of the facts. At about 8:15 a.m. on September 24, 1984, Alexis' mother took Alexis, then three years old, to the Center. She retrieved her daughter shortly after 3:00 p.m., and during the car ride home Alexis told her mother that an unidentified "purple man" had poked her "gina"—Alexis' word for vagina—with a "scrape." On October 19, 1984, after reading an article in the Scott Air Force Base newsletter discussing allegations of sexual abuse at the Center, John's mother asked three-year-old John whether anyone at the Center had touched him in a "bad way." John responded in the affirmative, and said that a man had touched his penis and a woman had touched his "bombosity"— John's word for buttocks.

After unsuccessfully seeking administrative relief, the parents of Alexis and John ultimately filed suit in district court on behalf of themselves and their children. The complaints, premised on the FTCA, sought damages of $8 million for medical expenses and emotional injuries to the parents and to their children. The district court consolidated the cases, and initially granted summary judgment to the government on the ground that the claim asserted was one "arising out of assault [or] battery," 28 U.S.C §§1346(b), 2680(h), and therefore was not cognizable under the FTCA. We reversed, holding that the claims arose out of a breach of an affirmative duty to the victims even if the persons committing the alleged assaults were government employees, and remanded the case for trial. *Doe v. United States*, 838 F.2d 220, 225 (7th Cir. 1988). The district court then dismissed the parents' claims for their own emotional injuries, but allowed them to remain as plaintiffs to pursue recovery for their children's medical expenses and emotional injuries.

At the bench trial, the district judge permitted the parents to testify as to the out-of-court statements their children made to them regarding the alleged abuse. It is these statements that form the basis of the government's appeal. The government contends that the children's admittedly hearsay statements did not fall within any exception to the general rule against admission of hearsay, and were therefore erroneously admitted. On cross-appeal, the plaintiffs maintain first, that the court improperly dismissed the parental claims for emotional distress, and second, that the damage awards are inadequate. We affirm.

II.

Under the residual, or catchall, exceptions of the Federal Rules of Evidence, *see* Fed. R. Evid. 803(24), 804(b)(5), the trial court may admit reliable hearsay that does not fall within one of the traditional, enumerated exceptions. These residual exceptions "accommodate ad hoc instances in which statements not otherwise falling within a recognized hearsay exception might nevertheless be sufficiently reliable to be admissible at trial." *Idaho v. Wright,* 110 S. Ct. 3139, 3147 (1990); *see* Advisory Committee Note to Rule 803(24). Congress intended that the residual exceptions be used sparingly; although trial judges are given considerable discretion in evaluating hearsay offered thereunder, that discretion is "tempered by the requirement that the exception be reserved for exceptional cases." John E.B. Myers, *Child Witness Law and Practice,* § 5.37, at 205 (Supp. 1991). Despite these admonitions, the residual exception is used with some frequency in child abuse litigation. *See, e.g., United States v. Shaw,* 824 F.2d 601, 609 (8th Cir. 1987), *cert. denied,* 484 U.S. 1068 (1988); *see also United States v. Dunn,* 851 F.2d 1099, 1101 (8th Cir. 1988).

The nation's courts are, unfortunately, awash with child sexual abuse cases; such litigation has been given the dubious label, "tort of the 1990s." *See* Dick Dahl, *Plymouth County Jury Award May Make Child Sexual-Abuse Litigation a New Tort of*

the 1990s, 1991 Massachusetts Lawyers Weekly, Apr. 15, 1991. The number of children sexually abused each year in the United States has been estimated at between 60,000 and 100,000, Ann Marie Hagen, Note, *Tolling the Statute of Limitations for Adult Survivors of Childhood Sexual Abuse*, 76 Iowa L. Rev. 355, 357 (1989) (citing L. Karp, *Domestic Torts: Family Violence, Conflict and Sexual Abuse* 154 (1989)), and even these disturbing statistics are underinclusive because many cases go unreported. *Id.* Detecting sexual abuse, and convicting its perpetrators, is problematic because of the lack of witnesses, the difficulty of obtaining corroborative physical evidence, and the typical reluctance or inability of the victim to testify against the defendant. Judy Yun, Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 Colum. L. Rev. 1745, 1745 (1983). In light of these circumstances, the out-of-court statements of the child victim take on exceptional significance; a youngster's hearsay statements in sex abuse cases often constitute the only proof that a crime has occurred. *Id.*[1]

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[1] Numerous states have attempted to address the problem by fashioning "tender years" exceptions to the general rule against hearsay admission. *See, e.g.*, Fla. Stat. Ann. §90.803(23) (West 1992) (establishing hearsay exception for statements of child victims). No such exception exists within the federal system, however, so courts have attempted to accommodate these statements through the use of other, existing exceptions under the Federal Rules. *See* Eleanor Swift, *The Hearsay Rule at Work: Has It Been Abolished De Facto by Judicial Decision?*, 76 Minn. L. Rev. 473, 498 (1992) ("[E]xpansive readings of Rules 803(2) [excited utterance] and 803(4) [statements for purposes of medical diagnosis or treatment], combined with the liberal use of the Rule 803(24) catch-all exception, create the sense that much of what a child victim says outside of court about being sexually abused will be admitted in federal trials."); *State v. Plant*, 461 N.W.2d 253, 264 (Neb. 1990) (upholding admission of "excited utterance" made by four-year-old child two days after alleged incident and after police questioning); *see also* Joseph Rand, Note, *The Residual Exceptions to the Federal Hearsay Rule: The Futile and Misguided Attempts to Restrain Judicial Discretion*, 80 Geo. L.J. 873 (1992) (heralding as a welcome development the increasingly liberal construction of residual exception).

The central issue in such cases typically is whether the proffered hearsay possesses indicia of reliability "equivalent" to the indicia of reliability supporting the traditional exceptions—whether, in other words, "the circumstantial guarantees of trustworthiness" of the hearsay offered under the residual exception are " 'equivalent' to the guarantees that justify the specific exceptions." *Huff v. White Motor Corp.*, 609 F.2d 286, 293 (7th Cir. 1979); *see Lee v. Illinois*, 476 U.S. 530, 543 (1986); *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).[2] *Idaho v. Wright, supra,* recently rejected the view that a mechanized test should be formulated to determine whether a child's out-of-court statement is reliable, and instead adopted a "totality of the circumstances" approach. Significantly, the Court stated that the trial judge may consider any evidence that sheds light on "whether the child declarant was particularly likely to be telling the truth when the statement was made." 110 S. Ct. at 3150. *Wright* identified several factors that trial courts may consider in evaluating the reliability of a child's hearsay statement, including spontaneity, consistent repetition, the mental state of the child at the time the statement was made, use of terminology unexpected of a child of similar age, and lack of motive to fabricate. This list, however, is "not exclusive, and courts have considerable leeway in their consideration of appropriate factors." *Id.* The Court, at least in the confrontation clause context, limited the relevant circumstances to "those that surround the making of the statement and that render the declarant particularly worthy of belief."

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[2] Courts and commentators dispute the reliability of children's accounts of sexual abuse. *Compare, e.g.*, Hollida Wakefield & Ralph Underwager, *Accusations of Child Sexual Abuse* 85-91(1988) (children's allegations of sexual abuse of limited reliability because children are not necessarily able to differentiate fact from fantasy) *with* Billie Wright Dziech & Charles B. Schudson, *On Trial: America's Courts and Their Treatment of Sexually Abused Children* 57 (1989) ("The veracity of sexually abused children has been analyzed by researchers, all of whom report that false accusations are extremely rare.").

Id. at 3148. That is to say, "if the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility, then the hearsay rule does not bar admission of the statement at trial." *Id.* at 3149.

As we previously have recognized, prosecutions based on sexual abuse allegations "place a strain on traditional notions of procedural justice." *Nelson v. Farrey,* 874 F.2d 1222, 1224 (7th Cir. 1989), *cert. denied,* 493 U.S. 1042 (1990). This is especially so in a case such as this, where the alleged abuse left no physical traces, and where the children were extremely young when the abuse occurred. *See id.* It is against this complex backdrop that we turn to the specifics of this case.

III.

A.

The government contends that the hearsay statements of Alexis and John contain inadequate circumstantial guarantees of trustworthiness to justify admission, and maintains, therefore, that the district court abused its discretion in admitting them. According to the government, without these hearsay statements there is insufficient evidence upon which to base a finding of liability.

At trial, the government argued that the parents should not be permitted to testify as to their children's out-of-court statements because Alexis and John were not competent at the time they made the statements, and that even if they were, the statements were hearsay not falling within any exception to the rule against hearsay admission. Tr. 7-8. Without explicitly ruling on the competency issue, the district court acknowledged that the parents' testimony regarding the children's accounts was hearsay, but admitted it because given "the circumstances under which [the parents] received the information from the children, the way that they have told the story, I think there is credibility."

Tr. 1054. In written findings, the district court reaffirmed its determination of credibility, and further noted that requiring the children to testify at trial would be psychologically harmful. App. at 4-5, 8-12. On appeal, the government contends that only one indicia of reliability—absence of motive to fabricate—is present here, and that this factor, standing alone, is insufficient to justify admission of the children's hearsay statements.

At the outset, we recognize the obvious difficulty in attempting to employ a consistent application of the residual exception. By its very nature, the exception is subject to varying standards regarding a statement's trustworthiness and the necessity for its use. *See* Ray Yasser, *Strangulating Hearsay: The Residual Exceptions to the Hearsay Rule*, 11 Tex. Tech. L. Rev. 587, 597, 603-04 (1980). Consequently, some commentators have criticized courts for expanding existing hearsay exceptions beyond recognition, *see, e.g.*, Yun, *supra*, while others have suggested that the trial courts' discretion under the residual exception be restricted to prevent standards of trustworthiness from falling too low. *See, e.g.*, Glen Lenhoff, Note, *The Federal Courts and the Catchall Hearsay Exceptions*, 25 Wayne L. Rev. 1361, 1377 (1979).

Whatever the merits of these criticisms, however, our function is not to establish new standards, or to second-guess the determinations of the trial judge. We review claims of reversible error in a trial court's decision to admit or exclude evidence only for abuse of discretion, and in so doing, give the trial judge great deference. *Littlefield v. McGuffey*, 954 F.2d 1337, 1342 (7th Cir. 1992); *Geitz v. Lindsey*, 893 F.2d 148, 150 (7th Cir. 1990); *United States v. Iron Shell*, 633 F.2d 77, 86 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981). Moreover, the trial court is entitled to a "considerable measure of discretion" in deciding whether to admit hearsay evidence under Rule 803(24) in particular. *Moffett v. McCauley*, 724 F.2d 581, 583 (7th Cir. 1984); *see also United States v. Vretta*, 790 F.2d 651 (7th Cir.), *cert. denied*, 479 U.S.

851(1986); *United States v. Howard,* 774 F.2d 838, 845 (7th Cir. 1985). As the Eighth Circuit observed in another case involving allegations of child sexual abuse, "Rule 803(24) provides a trial court with some flexibility when it must make a determination as to the admissibility of hearsay evidence, and there is no specific rule governing admissibility." *United States v. Cree,* 778 F.2d 474, 478 (8th Cir. 1985). The relevant benchmark is not how we would have ruled had we been standing in the trial judge's shoes, but rather, "whether *any* reasonable person could agree with the district court." *Littlefield,* 954 F.2d at 1342 (quoting *Geitz,* 893 F.2d at 150-51 (citations omitted; emphasis in original)); *Nachtsheim v. Beech Aircraft Corp.,* 847 F.2d 1261, 1266 (7th Cir. 1988). In reviewing the district court's evidentiary rulings, "we are mindful of the common-sense admonition that '[w]hen the choice is between evidence which is less than best and no evidence at all, only clear folly would dictate an across-the-board policy of doing without.' " *Morgan v. Foretich,* 846 F.2d 941, 943 (4th Cir. 1988) (quoting Fed. R. Evid. art. VIII advisory committee's note)).

B.

At trial, Alexis' mother testified that she had picked up her daughter at the Center shortly after 3:00 p.m. on September 25, 1984. During the car ride home, Mrs. Doe asked Alexis about her friends and if she wanted to visit the Center again. According to Mrs. Doe, Alexis replied that she had made friends, but asked her mother not to take her back to the Center any more. She further told her mother "that the teacher was very nice to her and that she put water [on] what she called her gina." Mrs. Doe stated:

> A: I felt pretty shocked and so I asked her what happened to her gina, why did she need it to feel better, and she said that the purple man had poked it with a . . . scrape and that it hurt and so that the white teacher made it feel better by putting water on it.

Q: What was said next?

A: I asked her what, I guess I just tried to figure out what all that meant, and asked her if they had touched her, and she said that yes, you know, yes they had, that they had poked her vagina and that the man said that he was sorry he hurt her, and [I] asked her what else happened and she said that the man had pulled his pants up and down, pulled them down and then pulled them up and then pulled them down, and then the mommy teacher . . . opened up her blouse and she said that she showed her titties to the man, and the man peed on both of them, and she had asked me to not take her there any more and she said I called you and called you, mommy, and you wouldn't come.

Tr. 42-43. Upon reaching their home, Mrs. Doe examined Alexis but discovered no visible physical signs of abuse. She then called her husband, a pediatrician at the Base, and told him the story. He told her to come to the Base hospital, which she did, where Alexis was examined by Dr. Donald Dicheson, the Base's chief pediatrician. Like Mrs. Doe, he discovered no signs of physical abuse. Tr. 45-46.

The Does subsequently reported the incident to the police. At the station, Alexis and her parents met with a Sergeant Lofties, and Alexis again stated that a purple man had poked her vagina with a scrape. When asked where the scrape was, Alexis said "it fell off in the car," which, according to Mrs. Doe, was "a new thing she had not told me." Tr. 52. Mrs. Doe testified that she and Lofties then took Alexis to a snack shop and then back to the Center; Lofties went inside, and, during his absence, Alexis made further statements regarding the alleged incident.

> I think she was still eating her sandwich or I was trying to get to her [sic] eat the sandwich, and she had said that earlier the purple man had put his penis in her mouth and peed in her mouth and made her throw up her sandwich.

Tr. 55. When bathing Alexis on the evening of the incident, Mrs. Doe, a registered nurse, noticed that "she had a little pin prick or needle prick mark in her toe" which appeared to be "an injection site, where you put the needle and there is just a little dot of blood on it." Tr. 55. In response to her mother's query about the marks, Alexis "said she was screaming and crying and making too much noise when these people had her, and so they gave her a shot and they said that if she was crying any more, they were going to give her another shot." Tr. 55.

The next day, Mrs. Doe took Alexis to the local rape crisis center, where Alexis was interviewed in a play room while Mrs. Doe watched through a one-way mirror. Mrs. Doe stated that her daughter removed the clothing from the dolls and pushed the naked dolls together on their genital areas. Tr. at 65. According to Mrs. Doe, Alexis had never witnessed adults having any kind of sexual relations.

Mrs. Doe then testified that at some point over the next few days, Alexis mentioned that a boy named Joey had been present, and revealed additional details.

> I remember her saying that these people gave her a bath after they had squashed her in between them and she couldn't breathe and the man rubbed his penis on her stomach and that they gave her a bath afterwards, they took her clothes off and folded them and gave her a bath, and the purple man told her that if she said anything, he would bite her . . . .

Tr. 66-67. According to Mrs. Doe, Alexis then told her "that the purple man touched the lady's titties, and they did ballet. The mommy teacher did ballet on the purple man, and that the lady said that when she got to be a woman or grown up that she could do ballet on the man, too." Tr. 67. At some point, Alexis also told her mother that while "the purple man and the teacher were in the other room doing bad things," Alexis "was in the kitchen, and the

dog was making her food." Tr. 105; *see also* Tr. 67. Alexis told her mother on another occasion that the dog drove her in a police car to a safe place. Tr. 105.

C.

John's mother testified that upon reading about allegations of child abuse at the Center in the base newsletter in October 1984, she asked John whether anybody had ever touched him or done something bad to him at the nursery (the family's term for the Center):

> [A]nd he said yes, they did, and I guess I was in shock that he said yes, so I just remember that I tried to stay calm, and I asked him, I guess I remember, I said, what happened John, and he went on— actually, I said who touched you, and he said a man, and he said a lady. I asked him where they had touched him and John at the time pointed to his penis and to his bottom, and I asked him if the man had a name, and he said yes, I said what was the man's name. He said the man's name was John. I asked him if the lady had a name, and he said no, he just referred to her as a lady.

Tr. 356-57. According to Mrs. Doe, John became "very angry and very uncomfortable," and asked her "why did you take me there?" Tr. 357. Mrs. Doe stated that she decided "not to push John" about the matter until her husband, who was out of town, returned, although in the interim she occasionally raised the issue. In response to questions about the lady's identity, John would say he did not remember, and when asked about the man's name, John "would become very angry and [say] I told you Mom, the man's name is John." Tr. 358. Mrs. Doe testified that John would then tell her that he did not want to discuss the matter any further.

Mr. Doe testified that he waited several days after returning from his trip to see whether John would initiate a discussion of

the incident. When he failed to do so, Mr. Doe asked his son whether anything ever happened to him at the nursery. According to Mr. Doe, "without any interruption [John] began a detailed description of what had happened to him." Tr. 538. Mr. Doe said that John "could not tell me where it had happened exactly, what room or anything like that, but he said that a man had touched him on his weenie, his term for penis," and further, "that a woman had touched him on his bombosity, which was his term for his bottom or his buttocks." Tr. 538. Mr. Doe asked if the man had a name, and his son responded, "yes, John," and when asked if the woman had a name, John replied no. When asked what they were wearing, John told his father that the man wasn't wearing any clothes, and that "the lady had red legs." Tr. 538. Mr. Doe stated that John offered this information in response to very general questions about the Center, and that he "didn't initiate the conversation in the context of 'something bad happened to you, didn't it, John.' " Tr. 539.

The Does testified that John later supplemented his story, stating that the "bad people" at the nursery had a snake, which "they put [on] my hand and it bit me." Tr. 557-58 (Mr. Doe). John also drew oval shapes on a piece of paper, and told his father that there were bags used in a game whereby "the man would jump in and out of the bag and then the kids would jump in and out of he [sic] bag" Tr. 603. According to Mrs. Doe, after the incident John began to draw pictures "of things with straight lines" and cages, and to talk about

> being burned. And at one time, at one point he had said the people told me that this is what would happen if I talked, and he drew a picture of a figure and then he scribbled it out with an orange marker and he said this is the fire and this is what would happen to me if I ever told anybody.

Tr. 511-12. Mrs. Doe testified that John drew pictures of two people, and later referred to another little boy, "Tonya," stating

"that they did this to Tonya, Tonya was a nice little boy, but they did this to Tonya too." Tr. 512.

D.

The government asserts, correctly, that hearsay not within an enumerated exception is presumptively unreliable, and the burden of overcoming that presumption falls on the party seeking to introduce the evidence. According to the government, because the children's comments satisfy only one indicium of reliability, the absence of a motive to fabricate, the plaintiffs failed to satisfy this burden.

In regard to Alexis, the government first argues that her story lacked consistency, because it accumulated new details that grew increasingly "bizarre"—such as the dog who made her food and drove a police car. It is true that reliability generally is enhanced when a child consistently repeats an out-of-court statement more than once, *see Cree,* 778 F.2d at 477 n.5. *But cf. State v. Robinson,* 735 P.2d 801, 811 (Ariz. 1987) ("Consistency does not always guarantee trustworthiness; it could be evidence that the statements were rehearsed."). Conversely, if the details of the abuse vary each time the event is described, reliability is less certain. *See State v. Taylor,* 704 P.2d 443, 452 (N.M. Ct. App. 1985); *State v. Smith,* 384 N.W.2d 546, 549 (Minn. Ct. App. 1986). But it is to *overall* consistency that we look, not constancy with regard to each and every detail. "What is most important is consistency regarding the core details of the experience. Consistency about peripheral details is less important." Myer, *supra,* § 5.37A, at 210. In *United States v. Dorian,* 803 F.2d 1439, 1444 (8th Cir. 1986), for example, inconsistency did not render a five-year-old sexual abuse victim's hearsay statements unreliable since "it frequently takes a long time for children to share what is really going on and they may then do so in stages, telling a little more each time."

Here, although various peripheral details concerning the alleged abuse expanded over time, the basic framework of Alexis'

story remained the same. Indeed, as the government acknowledges, Alexis never waivered in her account of a "mommy teacher" putting water on her "gina." On cross-examination, Dr. Dicheson testified that Alexis' statements to her parents were consistent, and that although three-year-old children typically "have a lot of fantasy and fantasy usually changes moment to moment or the story changes moment to moment," Alexis' parents were concerned because "each time the story was repeated, it seemed to be essentially the same type of message that was being presented." Tr. 198-99. That very consistency led Dicheson to conclude that abuse may have taken place. Tr. 199.

Nor are we troubled that Alexis divulged the specifics regarding the abuse in a piecemeal fashion. Contrary to the plaintiffs' contention, we do not find this, in itself, a circumstantial guarantee of trustworthiness—indeed, under this view the hearsay proponent would be in a no-lose situation: if the story is consistent, it is an indicium of reliability; if it is inconsistent in that the disclosures are offered in stages, it still serves as an indicium of reliability. We believe nonetheless that the *core* consistency of Alexis' story, which held firm with each new revelation, serves as an indicator of trustworthiness.

The government further maintains that because many of Alexis' statements were prompted by adult questions, they lacked the requisite spontaneity. *See Wright,* 110 S. Ct. at 3150 (spontaneity an indicator of trustworthiness). The government argues that Alexis' only spontaneous statement was the comment that her teacher was very nice and had put water on her "gina," and that all of her subsequent statements were elicited by the inquiries of her mother and investigators. The government is correct that the more spontaneous the statement, the less likely it is to be a product of fabrication, memory loss, or distortion. *See Morgan,* 846 F.2d at 946. Yet, a lack of spontaneity is not necessarily fatal to the admission of hearsay, especially in the child abuse context. *See State v. Sorenson,* 421 N.W.2d 77, 86

(Wis. 1988) (use of residual exception in child sexual assault cases even less tied to immediacy of statements because other indicia of reliability support its trustworthiness). Similarly, the fact that a statement is elicited through questioning does not necessarily defeat reliability. As *Wright* recognized, procedural requirements— such as an absence of leading questions—may "in many instances be inappropriate or unnecessary to a determination whether a given statement is sufficiently trustworthy . . ." *Id.* at 3148; *see also Nelson,* 874 F.2d at 1229. Moreover, as the government acknowledges, Alexis' core statements were offered at the child's own initiative, shortly after the alleged incident occurred, with no parental prompting.

As to Alexis' mental state, *see Wright,* 110 S. Ct. at 3150, the government maintains that her "matter-of-fact tone" in relating her account of the abuse fails to furnish a circumstantial guarantee of trustworthiness. Commentators have observed, however, that the childhood perspective on sexual experiences "does not produce the shock or excitement that the law presumes to exist after such an event. Quite often, the incident is related as part of the day's activities without any indication from the child that it was traumatic or unusual." Yun, *supra,* at 1757; *see Brown v. United States,* 152 F.2d 138 (D.C. Cir. 1945) (three-year-old child calmly reported assault in school that day during normal dinnertime conversation). Moreover, although Alexis reported the incident in a matter-of-fact tone, she became angry and upset when telling her mother that she had failed to come in response to her pleas for help.

Finally, the government claims that Alexis failed to provide "graphic descriptions" of the alleged sexual activity, and that her hearsay statements do not relate details of the sort that could only be acquired through direct sexual contact. *Cf. Nelson,* 874 F.2d at 1229 ("Merely playing with anatomically correct dolls would not have given [the victim] the idea that one might be sprayed in the face with 'white mud' from an erect penis."). At root, the

government's dispute is that the descriptions provided by Alexis were insufficiently "graphic" to establish that she had been exposed to some sort of sexual contact.

We disagree. Alexis' age, her knowledge, and her childlike description of the abuse give her statements the ring and quality of truth. *See United States v. Nick*, 604 F.2d 1199, 1204 (9th Cir. 1979). She stated that "the man" had "touched the ladies' titties and the mommy teacher had done 'ballet' on the purple man" and that "a purple man had put his penis in her mouth and peed in her mouth and made her throw up her sandwich." These graphic descriptions in childlike terminology are precisely the type that serve as an indicator of veracity; the use of the word "ballet" rather than the phrase "sexual intercourse," for example, indicates that Alexis actually witnessed the event and was not merely coached by someone using adult terms for sexual behavior.[3]

Given the "totality of the circumstances," *see Wright*, 110 S. Ct. at 3148, we find no abuse of discretion in the admission of the hearsay statements at issue. Alexis' graphic descriptions and consistency strongly suggest that her statements were trustworthy. As the Supreme Court has admonished, the test for admissibility is not a mechanized one. Although, for example, Alexis' mental state does not provide an indicium of reliability, the absence (or weakness) of trustworthiness in regard to one element does not necessitate exclusion of the proffered evidence. Alexis' hearsay statements were properly admitted.

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[3] We note that Dr. Gerwell similarly testified that during play therapy Alexis "clearly showed some sort of emesis type response, coughing or what we would interpret as being ill or throwing up or having emesis.... That particular scenario is impressive because it certainly would be the kind of thing that would not fit into normal type of exposure or experience of a child this age, or most children." Tr. 931-32; *see also* Tr. 934 ("It was my conclusion that [Alexis] had been exposed to some type of sexual, inappropriate sexual experience... [based upon] the details that she produced, particularly the realm of what appeared to be a fellatio incident.") (Dr. Gerwell).

Turning to John's statements, we first find that, contrary to the government's contentions, the core of his story remained consistent over time as well. John repeatedly maintained, for example, that the male assailant was named John, that he did not know the female's name, and that the abusers had touched his penis and his buttocks. *See also* Tr. 358 ("His story was very, very consistent with what he had originally told me . . . and I asked him again what the man's name was, he would become very angry and said I told you Mom, the man's name is John, and just pretty much was the same story the whole weekend.") (Mrs. Doe). Although his later accounts made references to such things as cages, threats of fire, snake bites, and a playmate, these are peripheral matters that did not alter the nucleus of his story.

We have a more difficult time in assessing the spontaneity of John's statements. Admittedly, they lack spontaneity in the traditional sense; yet, this does not automatically render them unreliable. First, as we previously observed, spontaneity in the child abuse context is not necessarily determinative of reliability. *See Sorenson,* 421 N.W.2d at 86 (contemporaneity and spontaneity of statements generally are not as crucial in admitting hearsay statements of young sexual assault victims under the residual exception); *see also Iron Shell,* 633 F.2d at 85-86. Furthermore, spontaneous *answers* to nonleading questions may be deemed reliable in appropriate circumstances. *Iron Shell,* 633 F.2d at 86; *Robinson,* 735 P.2d at 811 (five-year-old's statements spontaneous where "she explained what had occurred with little prompting."); *State v. McKinney,* 747 P.2d 1113, 1117 n.4 (Wash. Ct. App. 1987) ("Statements made in response to questions are spontaneous where the child volunteers the information in response to questions that are neither leading nor suggestive."); *see also Sorenson,* 421 N.W.2d at 86; *State v. Lindner,* 419 N.W.2d 352 (Wis. Ct. App. 1987) Here, John's parents stated that their son volunteered the specific information when asked general, nonleading questions about the Center. Furthermore, John volunteered additional information to his mother following a No-

vember 17 tour of the Center. Moreover, even the use of leading questions, as noted in *Wright,* does not necessarily render a child's out-of-court statements untrustworthy. 110 S. Ct. at 3148; *cf Iron Shell,* 633 F.2d at 92 (authorizing use of leading questions during direct examination of child witness).

It is also significant that in child sexual abuse cases, a delay often occurs between the assault and a statement by the child disclosing it, Yun, *supra,* at 1757; Jean L. Kelly, Comment, *Legislative Responses to Child Sexual Abuse Cases: The Hearsay Exception and the Videotape Deposition,* 34 Cath. U.L. Rev. 1021, 1024 (1985), often because the child fears reprisal or punishment. *See, e.g., People v. Davison,* 163 N.W.2d 10 (Mich. Ct. App. 1968) (nine-year-old girl delayed making statement for two weeks after assault because of her fear of defendant). In light of this, numerous courts have upheld the admissibility of out-of-court statements made some time after the alleged abuse and in response to questioning by a trusted adult. *See, e.g., Bertrang v. State,* 184 N.W.2d 867, 870 (Wis. 1971) (fact that child's assertions "are not made within a few minutes or even hours of the alleged assault is not controlling, nor is the fact that they are not volunteered but made in response to questions."); *State v. Superior Court of County of Pima,* 719 P.2d 283, 290 (Ariz. Ct. App. 1986). Here, given the details of John's accounts— including references to the "bad man's" threats to harm John through snake bites and the use of fire—the lack of spontaneity does not defeat a finding of reliability, and lends credence to the child's veracity. *See Fitzgerald v. United States,* 443 A.2d 1295, 1298 (D.C. Ct. App. 1982); *see also* Tr. 924 (interviews with John indicated that "he may have known but would not or could not release information . . . the suggestion that there were other factors acting to prevent him from being willing to participate and give more information") (Gerwell testimony); Tr. 924-25 (re-enactments of incident in play therapy with John suggested that injury or threat of injury had been involved) (Gerwell).

Admittedly, John's mental state and use of graphic descriptions, alone, do not provide significant support for admission of the testimony. John did become agitated and uncomfortable when discussing the incident, although not extremely so. As to child-like terminology, the words he used—"bombosity" and "weenie," for example—were not necessarily outside a three-year-old's realm of knowledge. Yet, we do not find this defeats admissibility. As we have emphasized, admissibility under the residual exception must be determined on a case-by-case basis, and here, when viewed in context and in totality, we cannot say the district court abused its discretion in admitting John's statements. John's tender age, the consistency of his story, the fact that his story provided a rationale for the lack of contemporaneity, and his voluntary statements in response to general, nonleading questions, support the district court's determination that his statements provided adequate guarantees of trustworthiness to justify admission.

Although the government further maintains that the competence of the out-of-court declarant is crucial in applying the residual hearsay exception (here, the district court conducted no inquiry to determine the competence of either Alexis or John), we need not address this argument at great length. In *Wright*, the Supreme Court rejected the contention that a young girl's hearsay statements were *per se* unreliable, or at least presumptively unreliable, on the ground that the trial court found her incompetent to testify at trial. Although the trial court found that the girl was "not capable of communicating to the jury," the Supreme Court noted that this did not necessarily mean the judge had deemed the girl incompetent to testify. Significantly, the Court stated, "the more reasonable inference is that, by ruling that the statements were admissible under Idaho's residual hearsay exception, the trial court implicitly found that the [girl], at the time she made the statements, was capable of receiving just impressions of the facts and of relating them truly." *Wright*, 110 S. Ct. at 3151. The same reasoning applies here. Although, as *Wright*

acknowledged, a child's ability to communicate "might be relevant to whether the earlier hearsay statement possessed particularized guarantees of trustworthiness," *id.* at 3151-52, because here (under *Wright's* reasoning) the district court implicitly found John and Alexis capable of understanding the facts and truthfully relating them, we do not find that its failure to determine the children's competency renders their testimony inherently unreliable. *See also Morgan,* 846 F.2d at 946, 949. We conclude that the district court did not abuse its discretion in allowing the parents to testify regarding their children's hearsay statements.

IV.

On cross-appeal, the parents contend that the district court improperly dismissed the state common-law counts, premised upon the tort of seduction, for their own emotional injuries suffered as a result of the molestations of their children. Under the FTCA, the United States is, as a general matter, liable in tort "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. The plaintiffs contend that Illinois law—the substantive law applicable here— recognizes this cause of action. The district court disagreed and dismissed the claim. We likewise conclude that Illinois courts would no longer recognize a cause of action for the tort of seduction.

In pressing this claim, the plaintiffs rely exclusively on nineteenth- and early twentieth-century cases. Of course, the mere fact that a case is old does not mean it is no longer good law, *see Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803); here, however, we believe the cases the plaintiffs rely upon are both inapposite and rest upon outmoded premises no longer accepted by Illinois courts. As the government points out, the plaintiffs allege that their children were abused as a result of the government's neglect; they do not claim, and the court did not find, that a government agent had perpetrated the abuse. None of the cases relied upon by the plaintiffs allow recovery from a

defendant on the ground that a "seduction" was *negligently permitted* to occur and, therefore, are inapplicable here. Moreover, as the district court observed, the seduction cases rest upon a conception of the parent-child relationship, and specifically, the father-daughter relation, as one of master and servant. *See, e.g., Ball v. Bruce,* 21 Ill. 161, 163 (1859) ("If plaintiff was the master and [his daughter] was the servant, and in consequence of her seduction he was deprived of her services, why may he not recover as any other master for the seduction of his servant."); *see also Hobson v. Fullerton,* 4 Ill. App. 282, 284 (1879) (requiring proof of master-servant relationship to recover on seduction theory). This outdated conception clearly is untenable today. *See, e.g. Bullard v. Barnes,* 468 N.E.2d 1228, 1233-34 (Ill. 1984) (contrasting nineteenth-century view, "when children were valued largely for their capacity to contribute to the family income," with modern view that "the chief value of children to their parents is the intangible benefits they provide in the form of comfort, counsel and society").

Finally, as the government observes, the type of damages for which the parents here seek recovery are sufficiently analogous to damages alleged for emotional injuries in other scenarios in which Illinois courts have rejected recovery, *see, e.g., Rickey v. Chicago Transit Auth.,* 457 N.E.2d 1, 5 (Ill. 1983) (party must satisfy "zone-of-physical-danger" test, which requires proximity to accident in which direct victim was physically injured and high risk to plaintiff of physical impact, to recover damages for emotional distress); *Dralle v. Ruder,* 529 N.E.2d 209, 212-14 (Ill. 1988) (no recovery to parents for loss of their society resulting from nonfatal injury to child), to conclude that recovery would be rejected here as well. As a general matter under Illinois law, "before a plaintiff can recover for negligently caused emotional distress, he must have, himself, been endangered by the negligence, and he must have suffered physical injury or illness as a result of the emotional distress caused by the defendant's negligence." *Siemieniec v. Lutheran General Hosp.,*

512 N.E.2d 691, 707 (Ill. 1987). The plaintiffs here do not satisfy these prerequisites. The district court properly dismissed the parents' claims for recovery grounded on the common-law tort of seduction.

V.

The parents' primary contention on cross-appeal is that the district court's damages awards of $25,000 to each child were inadequate. Under the FTCA, damages determinations are governed under the clearly erroneous standard, and the nature and measure of damages are assessed according to state law. *Jastremski v. United States*, 737 F.2d 666, 672 (7th Cir. 1984). We cannot overturn the district court's damage award unless its factual basis is clearly erroneous. *Wheel Masters, Inc. v. Jiffy Metal Prods.* Co., 955 F.2d 1126, 1131 (7th Cir. 1992); *Wolkenhauer v. Smith*, 822 F.2d 711, 715 (7th Cir. 1987); *Adams Apple Distr. Co. v. Papeleras Reunidas, S.A.*, 773 F.2d 925, 930 (7th Cir. 1985). Our task is limited to inquiring whether the trial court abused its discretion; it is not to consider whether we personally would have made the same award. *De Santis v. Parker Feeders, Inc.*, 547 F.2d 357, 365 (7th Cir. 1976); *see also Wolkenhauer*, 822 F.2d at 715.

The plaintiffs assign numerous errors to the district court's damages findings. The first involves the court's reference to the anatomical dolls used during the course of the investigations. In assessing damages, the district judge observed that the children's current psychological problems, which we discuss below, may not have been caused by the abuse, but "could well have been caused by something else, for example, the use of anatomically correct dolls by the Air Force and Illinois state investigator, Dr. Gerwell, or the people at [the] Rape Crisis Center where the Air Force referred the Does." App. at 6, 12.

The plaintiffs are correct (as the government concedes) that under Illinois law, "a person injured through another's negli-

gence can recover from the original tortfeasor not only for the original injury but for any aggravation of the injury caused by a physician's malpractice, assuming that there was no want of ordinary care in the selection of the physician." *Gertz v. Campbell,* 302 N.E.2d 40, 43 (Ill. 1973). According to the plaintiffs, since the government is the original tortfeasor, and the sexual abuse constitutes the original injury, the government also is liable for any enhanced traumatization caused by the government investigators' use of anatomically correct dolls in diagnosing and treating the children's abuse. While this may be correct as a purely legal matter, as a factual matter the district court did not, contrary to the plaintiffs' contention, explicitly find that the use of the dolls had resulted in emotional damages to the children. The plaintiffs' contention therefore fails.

The plaintiffs also contend that the court erred in "failing to consider elements of damage in the same manner a jury would have." Underlying this contention is the following statement by the district court:

> I can recognize the parents feel that these children have been severely traumatized and damaged. If I were in your position, I would feel the same way. If this were my child and my grandchild, I would have the same feelings that you have. I can't indulge the luxury of approaching the case from that standpoint.

Tr. 18. According to the plaintiffs, the judge erred because he "should be able to let his own emotions be a guide" in assessing damages. To buttress their claim, the plaintiffs provide capsule summaries of six sexual abuse cases yielding larger verdicts than the one rendered here. But aside from the superficial similarity of subject matter, these cases offer little in the way of useful comparison. That a six-year-old Texas boy suffering from chronic posttraumatic stress syndrome recovered $237,000 plus attorney fees following sexual abuse by a bus driver, *see Spann v. Tyler Indep. School Dist.,* No. TY S/B 6 213 CA (E.D. Tex. Mar.

25,1988), does little to illuminate the propriety or impropriety of the damages verdict here. We believe that the judge's statements were merely expressions of sympathy to the parents, and agree with the government that the court here simply recognized that a factfinder—be it judge or jury—must base its damages determination on the evidence and the appropriate legal standards, rather than adopt the perspective of the aggrieved party.

Finally, emphasizing the preponderance of the evidence standard, the plaintiffs dispute the court's finding that the plaintiffs had failed to adequately prove future or permanent emotional damages to either John or Alexis. In reviewing the damages ruling in this regard, it is helpful first to review the court's ruling on liability, for this determination affects its damages assessment. In its oral ruling that the plaintiffs had proved by a preponderance of the evidence that some sort of abuse had occurred, the court emphasized:

> I do think that these children were molested in some term of that word, they were molested in some way. I do not think that there was any—well, obviously from the evidence, there was no objective evidence of any physical injury, but there doesn't have to be. The slightest touch would have breached the duty, and would have resulted in an actionable situation.

Tr. 1057. As the government correctly observes, it is this conclusion that lays the foundation for the court's assessment of damages. We turn now to the awards in regard to each child.

Shortly after the molestation occurred, John began suffering extremely severe nightmares, known as "night terrors." He also began to engage in violent behavior, and became obsessed with violent themes in his play—ranging from an insistence on carrying knives, guns, and swords, to an obsession with sharks, viewing the movie "JAWS" some 100 times over a span of a few months. After the frequency of his night terrors alarmed his

parents, John spent two and one-half years in therapy with a clinical psychologist, George Kinsey. According to the plaintiffs, "John Doe is a troubled child." This may well, unfortunately, be all too true; but to recover damages the plaintiffs must establish to the factfinder both a nexus between John's emotional damages and the molestation, and that the damages are permanent or certain to recur in the future.

Under Illinois law, the plaintiff has the burden of establishing that damages were sustained, and of providing the court with a reasonable basis for computing those damages. *Adams Apple,* 773 F.2d at 930; *Schoeneweis v. Herrin,* 443 N.E.2d 36, 42 (Ill. App. Ct. 1982). "Damages may not be awarded on the basis of conjecture or speculation; if the plaintiff establishes that he is entitled to damages but fails to provide a proper basis with which to determine those damages, he may be awarded only nominal damages." *Adams Apple,* 773 F.2d at 930; *Schoeneweis,* 443 N.E.2d at 42. Damages are legally recoverable under Illinois law if they can be proved to a degree of reasonable certainty. *Chicago Title & Trust Co. v. Walsh,* 340 N.E.2d 106 (Ill. App. Ct. 1975); *Cummings v. Chicago Transit Auth.,* 408 N.E.2d 737, 742 (Ill. App. Ct. 1980).

Here, the district court found no evidence to relate causally either John's preoccupation with violence or his night terrors to his abuse while under the Center's care, and no evidence to show that John will need future medical or psychological treatment. Further, the court credited Dr. Gerwell's testimony that little, if any, damage, emotional or otherwise, should result from the incident, and found no evidence of any permanent or future damages. We find that the court did not abuse its discretion in determining that John's future or permanent damages were not established to a degree of reasonable certainty.

It is true, for example, that children often experience anxiety attacks soon after abuse has occurred, which may manifest itself through increased fear and nightmares. Hagen, *supra,* at 359; *see*

also Kinsey Dep. 53. But this does not translate into a causal relationship between John's abuse and his nightmares. *See* Kinsey Dep. 60 (although quite often children have nightmares subsequent to sexual abuse, "that's not the only reason why, of course."). Indeed, although Kinsey noted that John's nightmares and fixation with monsters is "consistent" with a history of sexual abuse, he declined to find a causal relationship:

> Again, you know, the fact that John had night terrors and had marked changes in mood and difficulty with frustration and so forth. There can be a lot of contributing factors to that; having had a trauma in his life could be one of those factors . . . could be. There's no way for me to know for sure.

Kinsey Dep. 61. The plaintiffs also maintain that the district court improperly concluded that John had not been grossly traumatized by the event because he did not immediately report the incident to his parents and appeared bored during his interview with Dr. Gerwell. Whether or not the court's observations on these points were correct as a factual matter, however, its assessment of damages did not flow from these comments. Rather, the court emphasized that the plaintiffs had not established any *causation* between John's emotional problems and the abuse. *See* App. at 12.

Moreover, although the plaintiffs point out that John required extensive therapy to treat the night terrors, the court awarded damages to cover these costs. The damages the court declined to award were for alleged future damages. Although the plaintiffs focus on John's preoccupation with violence and his night terrors, they do not provide the necessary link between these behaviors and the abuse. The range of emotional problems suffered by John, coming as they did on the heels of the abuse, leads one to conclude intuitively that they are linked to one another; but, as noted, damages awards may not be based on mere intuition or speculation along, and the trial court did not

abuse its discretion in finding that a causal relationship was insufficiently established.

With regard to Alexis, Mrs. Doe testified that for an approximately two-week period following the abuse, Alexis became depressed, very quiet, and withdrawn. Tr. 76. According to Mrs. Doe, during the next couple months Alexis "masturbated a lot with her dolls on her bed, she would take all their clothes off and be like a third person with two dolls.... She would rub her vagina where the dolls [sic] vagina would be, and there was [sic] always three of them." Tr. 76. Mrs. Doe further testified that Alexis played as a "participant" with the dolls for approximately three years, and that although Alexis no longer "get[s] on the dolls any more and participate[s], . . . her dolls do have intercourse, she takes their clothes off and Barbie and Ken also have intercourse." Tr. 77. Mrs. Doe also testified that Alexis exhibits an aversion to any show of affection between her mother and father. "[S]he complains a lot when my husband and I do, show each other simple affection, a hello kiss from work, she comes up and tells us to just stop that, that's nasty and that's dirty, which is very different from other children." Tr. 77. According to Mrs. Doe, Alexis gets angry when she sees such kissing, Tr. 78, and her father testified that since the incident Alexis is "deathly afraid of anyone vomiting." Tr. 233. Mrs. Doe stated that she had no plans to seek additional therapy for Alexis in the future, "unless I can see that things just aren't going right with her and she needs that. I fear making this an issue for her to identify really strongly with," Tr. 80, but indicated that she had not ruled out therapy if it is needed in the future. Tr. 81; *see also* Tr. 236 (Mr. Doe).

As with John, the district court determined that the plaintiffs had not established the necessary link between the abuse and Alexis' behavior. The following statement by the district court regarding Alexis' preoccupation with sexual matters is illustrative:

> Why do we assume that it's a result of this incident? Now it may well be, I am not saying it isn't. I am just saying that

> it's your burden to prove, just as it was your burden to prove that this happened, it's your burden to prove that her reaction to displays of affection between her parents is causally related to this incident. You have to prove that. I can't assume that.

Tr. 1065. The plaintiffs contend that, under this reasoning, a plaintiff never could recover for emotional injuries, which by their very nature lack tangible physical evidence. In our view, however, the district court did not apply such a restrictive approach. Several times during the plaintiffs' closing argument, the court indicated that the plaintiffs had failed to provide a sufficient link, even if that link was only in the way of circumstantial evidence. The court did not require tangible, physical evidence but only a causal link, which it did not find. *See, e.g.*, Tr. 1066 ("What I do expect . . . is some expert opinion that will tie these two things together, and there isn't. There is absolutely no evidence, *not even circumstantial*, because we can think of all kinds of things that would cause — the same way with the nightmares with John, is there a child that hasn't had nightmares, and for various reasons, for many reasons, but there is nothing to tie the nightmares to this.") (emphasis added); Tr. 1069 ("I think that a psychiatrist or a qualified psychologist with experience and background in these things could have opined something for us.").

The plaintiffs also argue that the abuse negatively affected Alexis' family environment — for example, Alexis' parents find themselves engaging in overprotective behavior — and that the resulting damages are recoverable under Illinois law. Although Dr. Gerwell did testify that the negative repercussions could be magnified by the children's environment and the way it is influenced by the abuse, Tr. 938, the court did not abuse its discretion in refusing to render an increased damages award on this basis.

The district court's statements indicate that, had the plaintiffs more clearly established some sort of link between the children's

behavior and the abuse, the damages awards would have been greater. The evidence provided by the plaintiffs did not establish that future damages were reasonably certain to occur, or even that the existing behavioral problems were more probably than not a result of the sexual abuse. Dr. Gerwell, for example, stated that in a single incident scenario, such as that which occurred with Alexis and John, standard criteria "would dictate that there would be minimal long term recall, if any, or any long term effects...." Tr. 939. Gerwell noted that he had yet to deal with a case in which the individual independently recalls sexual abuse before approximately age five or six, and further stated that "it would be conjecture" to say that Alexis' current conduct is necessarily related to the prior abuse. "It may sound logical to make that leap, but in our field, we have found quite clearly that all kinds of other things can precipitate behaviors." Tr. 941-42; *see also* Tr. 942 ("it becomes very very cloudy as to what is causing behaviors") (Gerwell); Tr. 942 ("In my opinion I would say it is extremely unlikely" that the abuse might or could have caused the reactions exhibited by Alexis) (Gerwell). The plaintiffs offered no credible testimony to counter Gerwell's statements.

Again, we emphasize the narrow scope of our review. We are limited to reviewing the district court's determinations under an abuse of discretion standard. As the government correctly observed in its brief, the district court did not credit every detail of the children's stories; it concluded only that the plaintiffs had proved, by a preponderance of the evidence, that the children had been subjected to some form of improper touching while under the Center's care. In assessing damages, the court determined that the plaintiffs had failed to establish the necessary causal link between that touching and the alleged resulting psychological harm. The effect of childhood sexual abuse varies with the individual, Hagen, *supra*, at 359, and while clinical studies suggest that sexually victimized children share recurrent emotional and psychological characteristics that manifest in later

adult life, *id.*, general statistics do not establish causation in a specific case.

Perhaps in the future, experts will develop new methods for assessing damages in cases involving unique emotional traumas, such as those resulting from child sexual abuse. On the liability end, courts and legislatures have increasingly permitted the tolling of the statute of limitations for adult survivors of child sexual abuse. *See generally* Hagen, *supra*. Perhaps similarly novel approaches — akin to those developed in other contexts, *see, e.g.*, Marcus L. Plant, *Periodic Payment of Damages for Personal Injury*, 44 La. L. Rev. 1327 (1984) (analyzing use of installment payment of judgments in products liability and medical malpractice cases) — likewise will emerge on the damages front. But that is an issue for another day, and another forum. *Cf. id.* at 1333 (although occasionally employed solely by judicial decision, incorporation of periodic payment plans in judgments involves such a substantial departure from common-law practices that it requires statutory authorization). On the facts and law before us, we find that, although a reasonable factfinder might reach a different conclusion, the district court did not abuse its discretion in setting the children's damages awards.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

JUDGMENT — WITH ORAL ARGUMENT

Date: October 1, 1992

BEFORE: Honorable JOEL M. FLAUM, Circuit Judge
Honorable KENNETH F. RIPPLE, Circuit Judge
Honorable HUBERT L. WILL, Senior District Judge*

Nos. 90-3762, 90-3763, 90-3764 & 90-3765

JOHN DOE, a minor, by his father and next friend, JAY DOE,
JAY DOE, CINDY DOE, et al.,
Plaintiffs - Appellees
Cross - Appellants

v.

UNITED STATES OF AMERICA,
Defendant - Appellant
Cross - Appellee

Appeals from the United States District Court for the
Southern District of Illinois, East St. Louis Division
No. 85 C 5630, Judge William L. Beatty

These causes were heard on the record from the above mentioned District Court, and were argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by the court that the judgments of the District Court are AFFIRMED, with costs, in accordance with the decision of this court entered this date.

*The Honorable Hubert L. Will, Senior District Judge of the Northern District of Illinois, is sitting by designation.

(1061-030690)

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

January 21, 1993

HON. JOEL M. FLAUM, Circuit Judge
HON. KENNETH F. RIPPLE, Circuit Judge
HON. HUBERT L. WILL, Senior District Judge*

No. 90-3762

JOHN DOE, a minor, by his father and next friend, JAY DOE,
JAY DOE and CINDY DOE,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Illinois, East St. Louis Division.

No. 85 C 5630
William L. Beatty, Sr. District Judge.

No. 90-3763

JOHN DOE, a minor, by his father and next friend, JAY DOE,
JAY DOE and CINDY DOE,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

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* The Honorable Hubert L. Will, Senior District Judge for the Northern District of Illinois, is sitting by designation.

Appeal from the United States District Court for the
Southern District of Illinois, East St. Louis Division.

No. 85 C 5630
William L. Beatty, Sr. District Judge.

No. 90-3764

ALEXIS DOE, a minor, by her father and next friend,
DAVID DOE, DAVID DOE and LINDA DOE,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Illinois, East St. Louis Division.

No. 85 C 5631
William L. Beatty, Sr. District Judge.

No. 90-3765

ALEXIS DOE, a minor, by her father and next friend,
DAVID DOE, DAVID DOE and LINDA DOE,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Illinois, East St. Louis Division.

No. 85 C 5631
William L. Beatty, Sr. District Judge.

ORDER

On consideration of the petition for rehearing and petition for rehearing *in banc* filed in the above-entitled cause on November 4, 1992, by plaintiffs-appellees, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing and petition for rehearing *in banc* and be, and the same are hereby DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

CASE NUMBER: 85-5631

ALEXIS DOE, et al.

v.

UNITED STATES OF AMERICA.

JUDGMENT IN A CIVIL CASE

[Filed: Oct. 10, 1990]

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of the plaintiff Alexis Doe and against the defendant United States of America in the sum of $25,000 and costs of suit.

October 10, 1990	STUART J. O'HARE
Date	*Clerk*
APPROVED: /s/William Beatty	/s/ Patricia Brown
DISTRICT JUDGE	*(By) Deputy Clerk*

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

No. 85 5631

ALEXIS DOE, Et al.,
Plaintiffs,

-vs-

UNITED STATES OF AMERICA,
Defendant.

FINDINGS OF FACT

[Filed: Oct. 10, 1990]

1. That on or about September 25, 1984 Alexis Doe was placed by her mother in the care, custody and control of employees of the Department of the Air Force of the United States of America at the Scott Air Force Base Day Care Center.

2. That while Alexis Doe was in the care of these agents of the defendant, United States of America, on or about September 25, 1984, Alexis Doe was assaulted by a person or persons unknown.

3. That the assault occurred at the Scott Air Force Base Day Care Center.

4. That the assault on Alexis Doe was proximately caused by the following negligent conduct of employees of the defendant, United States of America:

a. Defendant, through its agents, failed to properly supervise Alexis Doe while she was attending the Scott Air Force Base Day Care Center;

b. The United States failed to conduct criminal background investigations of its day care center employees;

c. On a regular basis, groups of children in rooms at the day care center were supervised by only one staff person;

d. Every care room at the day care center had an Exit to the outside which was frequently left open or unlocked and unguarded, with no alarms, so that anyone could enter these care rooms without observation by anyone other than the staff person or persons in that room.

5. That in determining that this child was assaulted, this court considered all of the testimony of the child's parents; Dr. Gerwell; the statements by these witnesses of what Alexis told them; the video taped interview of Alexis conducted by Dr. Gerwell; and the testimony of Dr. Dicheson.

6. No other testimony was considered on the issue of liability.

7. The court makes no finding as to the exact details of the assault on Alexis Doe.

8. There was no physical damage to this child resulting from the assault.

9. There was an emotional trauma to Alexis Doe resulting from the assault.

10. There is no evidence that there is any permanent or future damage to this child, emotionally or physically.

11. There is no evidence to causally relate the following behavior to the assault on Alexis Doe:

a. Her pre-occupation with sexual matters;

b. Her animosity towards her parents during shows of affection.

12. There is no evidence that Alexis Doe will need future treatment and she is not now receiving any treatment nor has she received any in the past that required her or her parents to expend funds.

CONCLUSIONS OF LAW

1. The court has jurisdiction over this matter by reason of the Federal Tort Claim Act, 28 U.S.C. §§1346(d) and 2671 *et seq.*

2. The law of the State of Illinois applies in this case both as to liability and as to damages.

3. The standard of proof applicable in this case is the preponderance of the evidence, in other words, what is more probably true than not true.

4. The plaintiff has met the standard of proof both as to liability and damages.

5. The government had a duty in this case to properly supervise young children left in its care at the Scott Air Force Base Day Care Center so that they would not be assaulted or otherwise injured by anyone.

6. The standard of care applicable in this case is the care that a reasonably careful person would exercise under the same or similar circumstances.

7. The court specifically rejects the imposition of a higher degree of care in this case.

8. The negligence of defendant, through its agents, the employees of Scott Air Force Base Day Care Center, was the proximate cause of the assault on Alexis Doe.

9. The court has considered the description of the tortious events given by Alexis to her parents and to Dr. Gerwell in reaching its decision in this cause, finding such testimony admissible as an exception to the hearsay rule because the circumstances under which the parents and Dr. Gerwell received that testimony provides an adequate basis of credibility and because Dr. Gerwell, as an Air Force officer, was an agent of the defendant. In addition, the court finds that it would be harmful

to the child psychologically to require her direct testimony in this trial.

10. The testimony of Alexis' parents, Dr. Gerwell, Dr. Dicheson, and the video tape of Alexis and Dr. Gerwell provided sufficient evidence, standing alone, and without considering the other evidence in this case, to convince this court that it is more probably true than not true that Alexis Doe was assaulted at the Scott Air Force Base Day Care Center.

11. The plaintiff has the burden of proving that it is more probably true than not true that Alexis Doe was damaged by the defendant's negligence and the nature and extent of that damage.

12. The elements of damage which this court has considered in this care [sic] are;

a. Past and future physical, mental, and emotional pain, suffering and distress;

b. Past and future expenses for medical treatment;

c. The value of time, earnings, profits and salaries lost in the past and reasonably certain to be lost in the future.

13. The court's verdict may not be based upon speculation, guess, or conjecture, but it must be based upon evidence.

14. There is no evidence which tends to show that Alexis Doe will have any need for future medical or psychological treatment.

15. There is no evidence that Alexis Doe was grossly physically injured.

16. The court is persuaded by Dr. Gerwell's testimony that there should be little, if any damage, emotional or otherwise, resulting from this incident in that it is over with.

17. There is no evidence of future damages in this case.

18. There is no evidence to causally relate Alexis Doe's current pre-occupation with sex and her animosity towards her parents showing affection to each other to her assault. It could well have been caused by something else, for example, the use of the anatomically correct dolls by the Air Force and Illinois State investigator, Dr. Gerwell, or the people at SIU-E Rape Crisis Center where the Air Force referred the Does.

19. Alexis Doe did receive emotional trauma proximately caused from her assault at the Scott Air Force Base Day Care Center.

20. Based upon the evidence, the above Findings of Fact, and the law, the court enters judgment in favor of the plaintiff Alexis Doe and against the defendant United States of America for the sum Twenty Five Thousand Dollars ($25,000.00) and costs of suit.

ENTERED: This 10th day of October, 1990

/s/ W. L. Beatty
William L. Beatty
United States District Judge.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

CASE NUMBER: 85-5630

JOHN DOE, et al.

v.

UNITED STATES OF AMERICA.

JUDGMENT IN A CIVIL CASE

[Filed: Oct. 10, 1990]

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of the plaintiff John Doe and against the defendant United States of America in the sum of $25,000 and costs of suit.

October 10, 1990
Date

STUART J. O'HARE
Clerk

APPROVED: /s/William Beatty
DISTRICT JUDGE

/s/ Patricia Brown
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

No. 85 5630

JOHN DOE, Et al.,
Plaintiffs,

-vs-

UNITED STATES OF AMERICA,
Defendant.

FINDINGS OF FACT

[Filed: Oct. 10, 1990]

1. That on or about October 19, 1984 John Doe was placed by his mother in the care, custody and control of employees of the Department of the Air Force of the United States of America at the Scott Air Force Base Day Care Center.

2. That while John Doe was in the care of these agents of the defendant, United States of America, on or about October 19, 1984, John Doe was assaulted by a person or persons unknown.

3. That the assault occurred at the Scott Air Force Base Day Care Center.

4. That the assault on John Doe was proximately caused by the following negligent conduct of employees of the defendant, United States of America:

a. Defendant, through its agents, failed to properly supervise John Doe while he was attending the Scott Air Force Base Day Care Center;

b. The United States failed to conduct criminal background investigations of its day care center employees;

c. On a regular basis, groups of children in rooms at the day care center were supervised by only one staff person;

d. Every care room at the day care center had an Exit to the outside which was frequently left open or unlocked and unguarded, with no alarms, so that anyone could enter these care rooms without observation by anyone other than the staff person or persons in that room.

5. That in determining that this child was assaulted, this court considered all of the testimony of the child's parents; Dr. Gerwell; the statements by these witnesses of what John told them; the video taped interview of John conducted by Dr. Gerwell.

6. No other testimony was considered on the issue of liability.

7. The court makes no finding as to the exact details of the assault on John Doe.

8. There was no physical damage to this child resulting from the assault.

9. There was an emotional trauma to John Doe resulting from the assault.

10. There is no evidence that there is any permanent or future damage to this child, emotionally or physically.

11. There is no evidence to causally relate his pre-occupation with violence, violent behavior, and his night terrors to the assault of John Doe.

12. There is no evidence that John Doe will need future treatment and he is not now receiving any treatment nor has he received any in the past that required him or his parents to expend funds.

CONCLUSIONS OF LAW

1. The court has jurisdiction over this matter by reason of the Federal Tort Claim Act, 28 U.S.C. §§1346(d) and 2671 *et seq.*

2. The law of the State of Illinois applies in this case both as to liability and as to damages.

3. The standard of proof applicable in this case is the preponderance of the evidence, in other words, what is more probably true than not true.

4. The plaintiff has met the standard of proof both as to liability and damages.

5. The government had a duty in this case to properly supervise young children left in its care at the Scott Air Force Base Day Care Center so that they would not be assaulted or otherwise injured by anyone.

6. The standard of care applicable in this case is the care that a reasonably careful person would exercise under the same or similar circumstances.

7. The court specifically rejects the imposition of a higher degree of care in this case.

8. The negligence of defendant, through its agents, the employees of Scott Air Force Base Day Care Center, was the proximate cause of the assault on John Doe.

9. The court has considered the description of the tortious events given by John to his parents and to Dr. Gerwell in reaching its decision in this cause, finding such testimony admissible as an exception to the hearsay rule because the circumstances under which the parents and Dr. Gerwell received that testimony provides an adequate basis of credibility and because Dr. Gerwell, as an Air Force officer, was an agent of the defendant. In addition, the court finds that it would be harmful to the child psychologically to require his direct testimony in this trial.

10. The testimony of John's parents, Dr. Gerwell, and the video tape of John and Dr. Gerwell provided sufficient evidence, standing alone, and without considering the other evidence in

this case, to convince this court that it is more probably true than not true that John Doe was assaulted at the Scott Air Force Base Day Care Center.

11. The plaintiff has the burden of proving that it is more probably true than not true that John Doe was damaged by the defendant's negligence and the nature and extent of that damage.

12. The elements of damage which this court has considered in this care [sic] are;

a. Past and future physical, mental, and emotional pain, suffering and distress;

b. Past and future expenses for medical treatment;

c. The value of time, earnings, profits and salaries lost in the past and reasonably certain to be lost in the future.

13. The court's verdict may not be based upon speculation, guess, or conjecture, but it must be based upon evidence.

14. There is no evidence which tends to show that John Doe will have any need for future medical or psychological treatment.

15. There is no evidence that John Doe was grossly physically injured.

16. The court is persuaded by Dr. Gerwell's testimony that there should be little, if any damage, emotional or otherwise, resulting from this incident in that it is over with.

17. There is no evidence of future damages in this case.

18. There is no evidence to causally relate John Doe's current pre-occupation with violence, violent behavior, and his night terrors to his assault. It could well have been caused by something else, for example, the use of the anatomically correct dolls by the Air Force and Illinois State investigator, Dr. Gerwell,

or the people at SIU-E Rape Crisis Center where the Air Force referred the Does.

19. John Doe did receive emotional trauma proximately caused from his assault at the Scott Air Force Base Day Care Center.

20. Based upon the evidence, the above Findings of Fact, and the law, the court enters judgment in favor of the plaintiff John Doe and against the defendant United States of America for the sum Twenty Five Thousand Dollars ($25,000.00) and costs of suit.

ENTERED: This 10th day of October, 1990

/s/ W. L. Beatty
William L. Beatty
United States District Judge.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

85-5630
85-5631

JOHN DOE and ALEXIS DOE,
Plaintiff,

v.

THE UNITED STATES OF AMERICA,
Defendant.

PRESENT: The Honorable William L. Beatty, Presiding

ATTORNEY FOR PLAINTIFF; George Ripplinger,
William Mueller

ATTORNEY FOR DEFENDANT: Jerome Madden,
Robin Smith

Non-Jury Trial
VOLUME II
June 21, 1990

TERI HANOLD HOPWOOD
Certified Shorthand Reporter
750 Missouri Avenue
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East St. Louis, IL 62201

* * *

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but I probably, with the Court's permission, if she gets here, put her on and interrupt Klutter again to make sure we can get her in and get her out.

MR. MADDEN: Can I ask who she is?

MR. RIPPLINGER: Hessnauer.

THE COURT: All right now we have got this thing with the parents; claims hanging. I don't think the parents have a claim, except for medical expenses for the children, not for themselves. One or both of the parents, as I understand the law, could claim past and future to the age of majority, medical expenses for the children. The children can also make that claim, and if the parents don't make it, then I assume the children would. But apart from that, I don't think there is any other claim for the parents. Mr. Ripplinger's argument may have deserved some consideration 100 years ago for the father as it applied to the daughter, maybe the son, I am not that conversant. I am not too sure that even in common law the father would have had a claim for sexual abuse of a son. I don't know. From the cases that you have submitted, and from the arguments you have made, it would seem that there are isolated courts in some few states which may recognize some kind of a claim. I am not convinced that Illinois in its wisdom would follow those states. I think that if we leave out of our consideration what now appears to be the stupid rules of previous generations about women and their rights, and lack of [180] rights, then I don't see that this injury or this tort to a child is any different than any other tort, legally. Obviously there are some emotional and psychological ramifications of what allegedly happened to these children, but of course, the physical injuries that arise out of a common automobile accident could have psychological and emotional injuries, so I have a difficult time seeing why the law as applied to this would be any different than the law applied if the children had been injured in an automobile accident with attending psychological and emotional trauma, or in some type of battery or assault which might be closer to what happened to the child but not the responsibility of the defendant. The responsibility of the defendant, of course, in this case, is based on negligence and not on any willful or actual tort. So I am going to allow the Government's motion to

dismiss the claims and the counts that enunciate the claims of the parents for injury to the child. Anybody have any questions about that?

MR. RIPPLINGER: So I understand it, the parents' claim is still viable for past and future medical expenses if there is sufficient evidence to support it.

THE COURT: And if you want to frame it that way, if you want to go that way, and to me that's a matter of tactics. You know, when I was practicing plaintiff's law, there were tactical reasons why sometimes you wanted to do that and **[181]** sometimes you didn't, and of course, it would have to be like any other item of special damages, it would have to be proven. Anything else?

(Whereupon the following was had in open court.)

THE COURT: For the record, the Government without objection from the plaintiff is going to call a witness out of turn, a Doctor Dicheson, is that correct?

MR. MADDEN: Yes, Your Honor.

THE COURT: Do you want to call the doctor?

DONALD DICHESON

having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MADDEN:

Q. Will you please state your name?

A. Donald Dicheson.

Q. And what is your profession?

A. Pediatrician.

Q. Where do you practice?

A. In Group Health Plan's office in Fairview Heights, Illinois.

Q. And were you in the Air Force?

A. Yes, I was.

Q. And can you give us the years that you were in the Air Force?

A. I was in the Air Force from 1965 to 1985.

* * *

Supreme Court, U.S.
FILED
JUN 23 1993
OFFICE OF THE CLERK

No. 92-1688

In the Supreme Court of the United States

OCTOBER TERM, 1992

JOHN DOE, A MINOR, BY HIS FATHER AND NEXT FRIEND, JAY DOE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether, in this action under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*, the district court abused its discretion in calculating damages.

2. Whether the court of appeals correctly determined that petitioners had not stated a cause of action for seduction under Illinois law.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1688

JOHN DOE, A MINOR, BY HIS FATHER AND NEXT FRIEND, JAY DOE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A30) is reported at 976 F.2d 1071. The orders of the district court (Pet. App. A36-A46) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A31) was entered on October 1, 1992. A petition for rehearing was denied on January 21, 1993. Pet. App. A32-A34. The petition for a writ of certiorari was filed on April 20, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This action, brought under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, involves allegations that two three-year-old children were sexually abused while in the care of the Scott Air Force Base Child Care Center (Center). The petitioners are the two children, who, though unrelated, are referred to as John Doe and Alexis Doe, and their parents, Jay and Cindy Doe and David and Linda Doe, respectively. Petitioners' theory was not that the Center's personnel had necessarily perpetrated the abuse, but that the Center's negligent supervision of the children permitted them to be abused by one or more unknown persons. Pet. App. A1-A2.

The district court initially granted the government's motion for summary judgment on the ground that petitioners' claims were ones "arising out of assault [or] battery," 28 U.S.C. 2680(h), and therefore were not cognizable under the FTCA. The court of appeals reversed and remanded the case for trial. *Doe* v. *United States*, 838 F.2d 220 (7th Cir. 1988); see also *Sheridan* v. *United States*, 487 U.S. 392, 401 (1988) (assault-and-battery exception to the FTCA does not preclude recovery on a claim that government officials negligently failed to prevent intentional tort); *id.* at 402-403 n.7 (citing prior panel opinion in *Doe* with approval). On remand, the district court dismissed the parents' claims for their own alleged emotional injuries but let them pursue their claims for their children's medical expenses and emotional injuries. Pet. App. A48-A49.

2. After a bench trial, the district court awarded damages of $25,000 for each child. Pet. App. A35. At trial, petitioners did not present any medical or other

physical evidence that the children had been abused. *Id.* at A6. Instead, they relied on the hearsay testimony of the children's parents regarding their children's accounts of the alleged abuse; the testimony of Dr. Gerwell, an Air Force major and clinical psychologist; and the videotaped interviews of petitioners John Doe and Alexis Doe conducted by Dr. Gerwell. *Id.* at A39, A43. On the basis of that evidence, the district court found that some kind of abuse had occurred:

> I do think that these children were molested in some term of that word, they were molested in some way. I do not think that there was any—well, obviously from the evidence, there was no objective evidence of any physical injury, but there doesn't have to be. The slightest touch would have breached the duty, and would have resulted in an actionable situation.

Id. at A24 (quoting Tr. 1057); see also *id.* at A37, A43. The court declined, however, to make findings "as to the exact details of the assault[s]." *Id.* at A37, A43.

The court further found that, although the children had suffered "emotional trauma," "[t]here was no physical damage" to either child "resulting from the assault." *Ibid.* The court also found "no evidence which tends to show that [either child] will have any need for future medical or psychological treatment." *Id.* at A39, A45. The court acknowledged that petitioners had introduced evidence that each child suffered from emotional problems. In its written conclusions of law, however, the court held that petitioners had failed to prove that those problems had been caused by the abuse. *Id.* at A39-A40, A45-A46.

3. On cross-appeals, the Seventh Circuit affirmed in all respects. Pet. App. A1-A30. It first held, rejecting the government's contention on appeal, that the parents' testimony regarding their children's accounts of the alleged abuse was admissible under the residual exceptions to the hearsay rule. *Id.* at A6-A20.[1] It next held that the parents' claims for their own alleged emotional injuries had properly been dismissed, because they are not cognizable under Illinois law. *Id.* at A20-A22. Finally, it held that the district court had not abused its discretion in calculating damages. *Id.* at A22-A30. The court of appeals emphasized that "the district court did not credit every detail of the children's stories; it concluded only that the plaintiffs had proved, by a preponderance of the evidence, that the children had been subjected to some form of improper touching while under the Center's care." *Id.* at A29. The court of appeals, like the district court, determined that "[t]he evidence provided by [petitioners] did not establish * * * that the existing behavioral problems were more probably than not a result of the sexual abuse." *Ibid.*

ARGUMENT

Petitioners renew their challenges to the district court's calculation of damages and its dismissal of the parents' claims for emotional injury. The court of appeals correctly rejected those challenges, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. The court of appeals correctly concluded that "the district court did not abuse its discretion in

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[1] The government does not challenge that holding.

setting the children's damages awards." Pet. App. A30. Petitioners' arguments to the contrary do not withstand scrutiny.

Petitioners first contend (Pet. 11-17) that the courts below required them to prove a causal link between the alleged abuse and their children's emotional problems "unequivocally" and by expert testimony, and refused to consider circumstantial evidence. Neither the court of appeals nor the district court, however, held petitioners to such heightened requirements of proof. The district court held that petitioners were required to prove liability and the extent of damages by a preponderance of the evidence, Pet. App. A39, A45, and it applied that standard in determining that petitioners had failed to establish a causal link between the children's emotional problems and the abuse, *id.* at A29.

Moreover, as the court of appeals recognized, the district court did not rule against petitioners because of the absence of expert testimony or direct evidence. The district court determined that petitioners "failed to provide a sufficient link, even if that link was only in the way of circumstantial evidence"; it "did not require tangible, physical evidence but only a causal link, which it did not find." Pet. App. A28. The court of appeals likewise applied a preponderance-of-the-evidence standard in holding that "[t]he evidence provided by [petitioners] did not establish * * * that the existing behavioral problems were more probably than not the result of the sexual abuse." *Id.* at A29. Thus, the courts below applied the ordinary and appropriate evidentiary requirements and standard of proof in this case.

Petitioners further contend that the district court's award of $25,000 for each child is so low as to be "shocking to the conscience." Pet. 11; see also *id.* at 23-30. That contention, however, rests on a mischaracterization of the district court's decision. Although petitioners assert that "the rape of a three year old child is certainly worth more than $25,000," Pet. 23, the district court conspicuously failed to find that any "rape" had occurred, *id.* at A37, A43. Rather, as the court of appeals emphasized, "the district court did not credit every detail of the children's stories; it concluded only that the plaintiffs had proved, by a preponderance of the evidence, that the children had been subjected to some form of improper touching while under the Center's care." *Id.* at A29. The court of appeals also noted that the district court's finding on this point "lays the foundation for the [district] court's assessment of damages." *Id.* at A24. Accordingly, the court of appeals correctly concluded that the district court had not abused its discretion in calculating damages. *Id.* at A29.

2. The district court dismissed petitioners' claims to recover for the emotional injuries allegedly suffered by the parents of John and Alexis Doe, which were premised upon the common-law tort of "seduction." The district court held that those claims are not cognizable under Illinois law. Pet. App. A48-A49. The court of appeals affirmed. *Id.* at A20-A22. It held that "Illinois courts would no longer recognize a cause of action for the tort of seduction," *id.* at A20, and, in the alternative, that, even if the tort were still viable in Illinois, petitioners had failed to state a claim for seduction. With regard to the latter holding, the court observed that "[n]one of the cases

relied upon by [petitioners] allow recovery from a defendant on the ground that a 'seduction' was *negligently permitted* to occur," and they therefore are inapplicable here. *Id.* at A20-A21.

Petitioners provide no reason for this Court to depart from its practice of deferring to the lower federal courts' construction of state law. See, *e.g.*, *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 & n.9 (1985). On the contrary, petitioners' own submission casts doubt on the continued viability of the tort of seduction in Illinois. According to petitioners, there are only two Illinois decisions "dealing with this theory of recovery," the more recent of which was decided in 1874 (Pet. 18), and "the most recent case [petitioners] could find on the subject" in any jurisdiction was decided by a Kentucky court of appeals in 1948 (Pet. 21). Moreover, as the court of appeals observed (Pet. App. A20-A21), the cases upon which petitioners relied permitted recovery from the person who committed the seduction; those cases are inapposite here, since petitioners "do not claim, and the court did not find, that a government agent had perpetrated the abuse." *Id.* at A20.[2]

Contrary to petitioners' contention (Pet. 23), the court of appeals' analysis of their state-law claims does not conflict with the court's prior decision in

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[2] Because nothing in the case law cited by petitioners suggested that the tort of seduction ever encompassed the type of claim presented here—*i.e.*, a claim that the defendant had negligently permitted the abuse of a child to occur (as opposed to a claim that the defendant himself had committed the abuse) —the court of appeals did not err in failing to certify to the Illinois Supreme Court the question whether the tort of seduction is still viable in Illinois. Petitioners' contention to the contrary (Pet. 22-23) does not warrant further review.

this case or with this Court's decision in *Sheridan* v. *United States*, 487 U.S. 392 (1988). In *Sheridan*, this Court held that the assault-and-battery exception to the FTCA, 28 U.S.C. 2680(h), does not prohibit recovery based on a theory that government officials negligently failed to prevent the commission of an intentional tort. 487 U.S. at 401; see also *id.* at 402-403 n.7 (discussing prior panel opinion in the instant case). But to recover damages under the FTCA, a plaintiff must do more than demonstrate that the suit is not barred by an FTCA exception; the plaintiff must show that his or her cause of action is recognized under the law of the State in which the alleged tort occurred. See 28 U.S.C. 1346(b) (FTCA suit is to be adjudicated "in accordance with the law of the place where the act or omission occurred"). In affirming the district court's dismissal of petitioners' claims based upon a theory of seduction, the court of appeals correctly held that those claims, though not barred by any FTCA exception, did not state a cause of action under Illinois law. That question of state law does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MALCOLM L. STEWART
Attorneys

JUNE 1993